IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:7-4-2005

CORAM:

THE HON'BLE MR.JUSTICE N.V.BALASUBRAMANIAN
and
THE HON'BLE MR.JUSTICE S.SARDAR ZACKRIA HUSSAIN

A.S.Nos.851 of 1989 &
606 of 1989 and
C.M.P.No.5356 of 2004
...

A.S.No.851 of 1989:

Hindu Community in General
and Citizens of Gobichettipalayam
1.Senniappa Chettiar
2.G.K.Jayajothimurugan.

... Appellants[Plaintiffs].

vs.

1. The Commissioner, Hindu
   Religious and Charitable
   Endowment, Madras.

2.Revenue Divisional Officer,
  Gobichettipalayam Division,
  Gobichettipalayam.

3.District Munsif,
  Gobichettipalayam.

4.G.K.Perumal

5.Ramayammal

6.Thirugnanasambandam

7.T.M.Natarajan

8.Dhinakaran

9.Dr.M.R.Subbaiyan

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10.Narayana Iyer

11.K.V.Narasimhan

12.Dr.K.S.Palanisami

13.Deivathal (died)

14.P.Sivakumar

15.Arulmighu Dhandayuthapaniswami
Tirukoil by its Deputy Commissioner-
Executive Officer, Palani, Madurai.

16.G.S.Lakshmanan

17.N.R.Thiruvenkadam

18.N.T.Gobikrishnan

19.Mrs.Jayasudha

20.Ramamorthy Thiruvenkadam

(Respondents 17 to 20 are impleaded as LRs. of the deceased 13th respondent vide as per order of Court dated 1.8.2002 made in CMPs.8524 to 8526/02).

... Respondents
(Defendants 1 to 5 and 7 to 17).

A.S.No.606 of 1989:

1. G.K.Perumal
2. Ramayammal.

... Appellants
(Defendants 4 and 5).

vs.

1.Chenniappa Chettiar,
Hanumantharayan Koil St.,
Gobichettipalayam.

2. G.K.Jaya Jothi Murugan (representing
Hindu Community in General and
Citizens of Gobichettipalayam)
73, Bazaar St., Gobichettipalayam.

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3. The Commissioner,
   Hindu Religious and Charitable
   Endowments, Madras.

4.Revenue Divisional Officer,
  Gobichettipalayam Division,
  Gobichettipalayam.

5.District Munsif,
  Gobichettipalayam.

6.Arulmigu Dhandayuthapani Tirukoil,
  rep. By its Deputy Commissioner/
  Executive Officer, Palani.

... Respondents.
(Plaintiffs and
Defendants 1,2 and 3
and 16).

Both the appeals filed against the judgment and decree dated 2.2.1989 made in O.S.No.76 of 1981 on the file of Sub Court, Gobichettipalayam.

A.S.No.851 of 1989:

Mr.T.R.Mani, Sr.counsel for
Mr.M.Duraiswamy ... for 2nd appellant.
... 1st appellant (died)

Mr.G.Sukumaran,
Spl.G.P.(H.R.& C.E.) ... for 1st respondent.

Mr.S.Senthilnathan, AGP ... for 2nd respondent.

Mr.S.V.Jayaraman, Sr.counsel
for Mr.S.T.S.Murthi ... for 4 & 5th respondents

Mr.V.K.Muthuswami, Sr.counsel
for Mr.M.M.Sundaresh ... for 6 & 9th respondents.

Mr.P.V.Ramachandran ...for8,10 & 11th respondents.

Mr.R.Gandhi, Sr.counsel
for Mr.M.Kandasamy ...for 12th respondent.

Mr.M.Venkatachalapathi, Sr.counsel
for Mr.D.Rajendran ... for 15th respondent.

Mr.B.T.Seshadri ...for 17 to 20th respondents.

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[LRs of Respondent No.13]

No appearance for 7,14 and 16th respondents.

A.S.No.606 of 1989:

Mr.S.V.Jayaraman, Sr.counsel
for Mr.S.T.S.Murthi ... for Appellants.

... 1st respondent (died)

Mr.T.R.Mani, Sr.counsel for
M.Duraiswamy ... for 2nd respondent.

Mr.G.Sukumaran, Spl.GP.
(HR & CE) ... for 3rd respondent.

Mr.S.Senthilnathan,AGP ... for 4th respondent

Mr.M.Venkatachalapathi,Sr.counsel
for Mr.D.Rajendran ... for 6th respondent.

....

JUDGMENT

N.V.BALASUBRAMANIAN,J.

A.S.No.851 of 1989:

An interesting question of law arises in the appeal in A.S.No.851 of 1989 regarding the character of the Will left by one Palaniappa Chettiar (testator) and his wife Chinnammal @ Rangammal (testatrix) and the question is whether the Will left by them dated 26.9.1968 is a joint Will or a joint and mutual Will. The question that arises in A.S.No.606 of 1989 is whether the Will executed by Chinnammal @ Rangammal dated 27.11.1980 is a true, valid and genuine Will. Apart from the two questions in both the appeals, other points that arise are, whether the suit has been properly instituted after getting proper leave of the Court under section 92 CPC, whether the properties left by the testator and the testatrix are trust properties and whether the trust has been validly created and also other incidental questions regarding the maintainability of the appeal.

2. The brief facts of the case are as under:-

(a) The plaintiffs are the appellants in A.S.No.851 of 1989 and they have filed the appeal against the dismissal of suit in O.S.No.76 of 1981 on the file of Subordinate Judge, Gobichettipalayam. The other appeal, A.S.No.606 of 1989 is filed by the defendants 4 and 5 in the suit against the adverse finding regarding the validity of the will Ex.B-109.

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(b) O.S.No.76 of 1981 was instituted before the Subordinate Judge, Gobichettipalayam by the plaintiffs, Senniappa Chettiar and G.K.Jayajothimurughan in their representative capacity on behalf of Hindu Community in General and Citizens of Gobichettipalayam. The suit was filed for a decree arranging for the management of the suit trust by the defendants 1 to 3 by entering on their duties as trustees or by appointing new trustees and settling a scheme to ensure an effective and proper administration of the trust and its properties. There is no prayer for costs. The suit was instituted on the basis of a Will dated 27.9.1968 (Ex.A-5) executed by N.Palaniappa Chettiar and his wife Chinnammal @ Rangammal. The eo-nominee first plaintiff is the brother of Rangammal and the eo-nominee second plaintiff is the first plaintiff's daughter's son and as persons interested in the trust, they filed the suit for proper administration of the trust as envisaged in Ex.A-5.

(c) Though the plaint runs to nearly 12 pages, the essential facts necessary for the disposal of the appeals are that Palaniappa Chettiar was a self-made man and he migrated from a village called, Siruvalur in or about 1930 to Gobichettipalayam. He had a lucrative shroff and money-lending business. Palaniappa Chettiar earlier executed a Will dated 15.7.1931(Ex.A-6) and the Will shows his philanthropic bent of mind and he bequeathed his properties for charities subject to variance depending upon begetting issues between him and his wife Chinnammal @ Rangammal. He also mentioned the list of properties as well as the list of charities to be done in the Will executed as early as on 15.7.1931 (Ex.A-6). Palaniappa Chettiar later executed a Will dated 15.7.1956 (Ex.B-14) and the Will has been taken into consideration only for identifying the signature of Palaniappa Chettiar and not for proving the contents of the document as seen from the deposition of D.W.1 at page 140 of typed-set of papers. The Will of Palaniappa Chettiar dated 15.7.1931 was cancelled by him by executing the document, Ex.B-110. The suit Will Ex.A-5 was executed by Palaniappa Chettiar and his wife Chinnammal @ Rangammal and the Will was also registered in the Office of Sub-Registrar, Gobichettipalayam.

(d) According to the plaintiffs, Palaniappa Chettiar acquired extensive properties of his own and he also acquired properties in the name of his wife Chinnammal @ Rangammal for his benefit and she had no wherewithal. Though a plea of benami was set up, the trial Court rejected the said plea on the ground that the properties held by Chinnammal @ Rangammal were not purchased benami by Palaniappa Chettiar. Mr.T.R.Mani, learned senior counsel for the second appellant has not challenged the said finding and proceeded with the appeal on the basis that the properties standing in the name of Palaniappa Chettiar are his properties and the properties standing in the name of Chinnammal @ Rangammal are her own properties.

(e) According to the plaintiffs, Palaniappa Chettiar and his wife Chinnammal @ Rangammal by the suit Will dated 27.9.1968 (Ex.A-5) created a trust for charitable objects and during their life time, Palaniappa Chettiar and his wife were to manage the properties and perform the

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charities and if they were unable to perform the charities and after the lifetime of both, the Committee consisting the defendants 1 to 3 was to fulfil the charitable objects. The charitable objects as set out in the Will are as under:-

a) A Chatram to be constructed at Palani in the names of both of them for use by all Hindus, to be administered by the Endowment Commissioner.

b) To arrange for Naivedyam during early morning pooja of Palani Andavar at Palani.

c) During the Thai Poosam festival at Palani Annadanam to be performed in their name.

d) At Gobi where they prospered, an Educational Institution is to be established in their names to be administered by the Government or Municipal Administration.

e) A Maternity Home to be built in the names of both of them to be managed by the Government.

(f) According to the plaintiffs, the trust is to be controlled and the objects of the trust are to be accomplished by utilising the income from the properties held by Palaniappa Chettiar and his wife Chinnammal @ Rangammal and the charities are to be performed by the Committee consisting the defendants 1 to 3. The case of the plaintiffs is that the suit Will dated 27.9.1968 (Ex.A-5) is a joint and mutual Will and it became irrevocable on the death of Palaniappa Chettiar on 5.10.1969, and on the demise of her husband, Chinnammal @ Rangammal, the surviving testatrix received the benefit under the Will. An alternative contention is also raised that if the Will is not a joint and mutual Will, it will take effect at least as regards Palaniappa Chettiar's properties and his wife Chinnammal @ Rangammal has no right to meddle with the same.

(g) The suit came to be instituted, because a subsequent Will of Rangammal (Ex.B-109) dated 27.11.1980 was set up by the defendants 4 and 5 in derogation of the trust which would amount to breach of trust. According to the plaintiffs, the defendants 4 and 5 belong to different community and the fourth defendant was a Bill Collector in Gobi Municipality and the fifth defendant is his wife and she was a domestic servant doing cooking work and washing clothes of Chinnammal @ Rangammal and with a view to interfere with the trust properties, they set up the Will dated 27.11.1980 as if it was executed by Rangammal in favour of the defendants 4 and 5. The case of the plaintiffs is that the Will dated 27.11.1980 is not a true and valid Will and it was not executed by Rangammal in sound disposing state of mind, but it was brought about by the defendants 4 and 5 by way of fraud, undue influence and coercion.

(h) The defendants 6 to 13 are purchasers of some of the properties from Rangammal and from the defendants 4 and 5 and according to the plaintiffs, the defendants 4 to 13 are trespassers of the trust properties. The defendants 14 and 15 are tenants and the 16th defendant is Palani Devasthanam, a beneficiary under Ex.A-5 Will and the 17th defendant

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is also a subsequent purchaser.

(i) Along with the suit, the plaintiffs have filed three applications in I.A.Nos.193 to 195 of 1981. I.A.No.193 of 1981 was filed for leave of the Court to institute the suit in the representative capacity. The trial Court in paragraph-60 of the judgment referred to the order made in I.A.No.193 of 1981 and recorded a finding that the procedure prescribed under Order I, Rule 8 C.P.C. was complied with and paper publication was effected and objections were received from the defendants. As far as I.A.No.194 of 1981 is concerned, it was filed to dispense with the notice under section 80 C.P.C. It is relevant to mention that notice under section 80 C.P.C. was not issued, as the plaintiffs filed the suit against the defendants 1 to 3 not in their official capacity, however, out of abundant caution they filed the application under section 80(2) C.P.C. to dispense with the issue of prior notice under section 80 C.P.C. The trial Court in paragraph-59 of the judgment held that since the proceedings were not instituted against the defendants 1 to 3 in their official capacity, there was no need to issue notice under section 80 C.P.C. and that finding is also not seriously disputed before us. I.A.No.195 of 1981 was filed to grant leave under section 92 CPC to sue on behalf of Hindu Community and Citizens of Gobichettipalayam. The certified copy of the order passed in I.A.No.195 of 1981 is placed before us and it is seen that the trial Court ordered notice in the said application and some of the defendants filed counter and ultimately, the trial Court allowed the application by order dated 8.2.1982.

(j) Written statements have been filed by the defendants 1,4,5,6,7,9,10,11,12,13,15 and 16. The 8th defendant filed a memo adopting the written statement filed by the defendants 4 and 5. In the written statement filed by the first defendant, no plea has been raised regarding the notice under section 80 C.P.C. but the written statement proceeds on the basis that a direction should be issued to the plaintiffs to avail the remedies under the Tamil Nadu Hindu Religious and Charitable Endowments Act to decide the nature of the institution. The first defendant has also not taken a plea that the suit is barred under the provisions of the H.R. & C.E. Act. The defendants 4 and 5 in their written statement has stated that they are claiming title to the suit properties under the Will executed by Rangammal dated 27.11.1980. It is stated that Rangammal was the sole heir of her husband Palaniappa Chettiar and she became absolute owner of the entire properties of her husband and it is only in respect of the properties that remained undisposed of by Rangammal, the Will could be said to operate regarding the purpose of the charities and hence, the properties dealt with by Rangammal by way of sale or conveyance cannot be questioned by the plaintiffs. It is not necessary to burden the judgment with the contentions raised by other defendants as the case involves the question of construction to be placed on the Will executed by Rangammal and Palaniappa Chettiar (Ex.A-5).

3. The trial Court framed as many as 17 issues and on the basis of

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evidence let in by both the parties, the trial Court held that the Ex.A-5 Will is a true and valid Will and it is a joint Will and not a joint and mutual Will and Rangammal is entitled to revoke Ex.A-5 Will. The trial Court also held that no valid trust was created over the suit properties under the Indian Trusts Act. The trial Court also held that the plaintiffs are not entitled to a scheme decree. The trial Court held that it is not clear as to whether the Will Ex.A-5 would take effect regarding the properties belonging to Palaniappa Chettiar. The trial Court held that the suit is not barred under section 108 of the H.R. & C.E. Act and the plaintiffs are entitled to sue in their representative capacity and the suit is not bad for want of notice under section 80 C.P.C. The trial Court held that the properties standing in the name of Rangammal were not held by her benami for the benefit of her husband and she is entitled to deal with her husband's properties and her properties and the sales in favour of defendants are valid. The trial Court also held that since the trust is not established, the suit is not maintainable. The trial Court held that Ex.B-109 Will in favour of defendants 4 and 5 is not a true and valid Will and was not executed by her in a sound and disposing state of mind, and ultimately, the trial Court dismissed the suit. It is against the judgment and decree of the trial Court dismissing the suit, the plaintiffs have filed the appeal, A.S.No.851 of 1989, and against the finding regarding the validity of Ex.B-109, the defendants 4 and 5 have filed the appeal, A.S.No.606 of 1989. Other defendants have not filed any appeal or cross-objections.

4. We are of the view that it would be profitable to refer to the substance of the arguments of learned counsel for parties for framing points for consideration before going into the arguments of learned counsel for parties in detail with reference to each point for consideration.

5. Mr.T.R.Mani, learned senior counsel for the second appellant submitted that the suit has been properly instituted under section 80 C.P.C. and the leave of the Court has been obtained to sue in the representative capacity and the leave under section 92 C.P.C. has also been properly obtained. His main submission was that the suit Will, Ex.A-5 is a joint and mutual Will and Rangammal having obtained benefit under the Will is not entitled to revoke the Will. He also submitted that there was an agreement not to revoke the Will also. He therefore submitted that the finding of the trial Court that the Will is a joint Will and not a joint and mutual Will is not correct in law.

6. Mr.S.V.Jayaraman, learned senior counsel appearing for the respondents/defendants 4 and 5 submitted that the suit is bad for want of prior notice under section 80 C.P.C. as no prior leave has been obtained by the plaintiffs before instituting the suit. He also submitted that the leave obtained under section 92 C.P.C. during the pendency of the suit would not cure the defect in instituting the suit. He also submitted that the Will in question is a joint Will and not a joint and mutual Will.

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Learned senior counsel submitted that to regard a Will as a joint and mutual Will, the survivor should have received benefit under the Will and there should be an agreement not to revoke the Will. He submitted that both the conditions to regard the Will as a joint and mutual Will are lacking on the facts of the case. Learned senior counsel submitted that no trust has been created as there is uncertainty over the properties over which trust would come into existence and no property was earmarked for charity and no trust has come into existence.

7. Mr.V.K.Muthusamy, learned senior counsel submitted that the leave was not obtained in the manner contemplated under section 92 C.P.C. and the suit is bad for want of proper leave of the Court. He also submitted that the Will is not a mutual Will, but it is a joint Will and the surviving testator was entitled to enjoy the properties absolutely. He also emphasised that only in respect of the remaining properties, the trust was sought to be created which indicates that the surviving testator had the full power of alienation and the alienees are bona fide purchasers for value and the alienations in favour of his clients are valid in law.

8. Mr.P.V.Ramachandran, learned counsel appearing for some other alienees submitted that though the provisions of the Indian Trust Act are not strictly applicable, the principles of the Indian Trust Act would apply. Learned counsel submitted that unless there is certainty with reference to the properties of the trust, the trust is not created by the Will and the trust fails for want of certainty of trust properties and on the facts of the case, the trust failed due to uncertainty with reference to the properties. Mr.V.K.Muthusami, learned senior counsel and Mr.P.V.Ramachandran, learned counsel submitted that the alienees have purchased the properties for valuable consideration and they have also made improvements in the properties and hence, the alienation should be protected by the Court.

9. Accordingly, we frame the following points for consideration:

1.Whether the suit is bad for non-issue of notice under section 80 C.P.C.?

2. Whether the plaintiffs have validly filed the suit in their representative capacity?

3. Whether the suit has been validly instituted under section 92 C.P.C.?

4. Whether the suit Will, Ex.A-5 is a joint Will or a joint and mutual Will?

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NOTICE U/S.80 CPC:

10. The plaintiffs have obtained permission under section 80(2) C.P.C. in I.A.No.194 of 1981 and the trial Court, by order dated 8.2.1982, dispensed with the notice under section 80 C.P.C. Further, the notice

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under section 80 CPC. was also not required to be given as the defendants 1 to 3 have not been sued in their official capacity and hence, there was no need to issue notice under section 80 CPC as well. We are of the view, notice under section 80 CPC is required to be given when the suit is sought to be instituted against an official in respect of the acts done by him in his official capacity and since the defendants 1 to 3 have not been sued in respect of any act done by them in their official capacity, notice under section 80 C.P.C. is not necessary. Mr.S.V.Jayaraman, learned senior counsel appearing for the respondents 4 and 5 has also not seriously disputed the position.

REPRESENTATIVE CAPACITY:

11. The suit has been instituted in representative capacity and it is seen from the records, the plaintiffs have filed an application I.A.No.193 of 1981 and on the date of filing itself, the trial Court granted the necessary permission and there was publication of notice, and on the basis of the evidence of P.W.1 who was not cross-examined on that aspect, the trial Court held that permission granted on 16.2.1981 was in existence till the disposal of the suit. We find that the suit has been validly instituted in the representative capacity and there is no serious objection raised by the respondents on this aspect.

SECTION 92 C.P.C.

12. The suit has been instituted under section 92 C.P.C. on the ground that there was no proper administration of the trust and its properties. The suit was filed in the trial Court on 16.2.1981 and on the same date, the plaintiffs filed an application in I.A.No.195 of 1981 under section 92 CPC seeking leave of the Court to institute the suit under section 92 CPC. The trial Court ordered notice to the respondents in the application and after the respondents filed counter and after enquiry, the trial Court ultimately, by order dated 8.2.1982, granted the necessary leave under section 92 C.P.C.

13. Mr.T.R.Mani, learned senior counsel for the second appellant submitted that the leave under section 92 C.P.C. has been validly granted. He relied upon the decision of this Court in B.S.ADITYAN v. R.KANNAN ADITYAN (AIR 1983 Madras 334) and submitted that the suit must be deemed to have commenced with the filing of the application for leave. Mr.S.V.Jayaraman, learned senior counsel, on the other hand, submitted that the leave under section 92 C.P.C. is a condition precedent for maintaining a suit and since the leave is mandatory, the leave should have been obtained by the plaintiffs prior to the institution of the suit. He referred to section 92 CPC and submitted that the expression, 'having obtained the leave of the Court may institute a suit' implies that the plaintiffs should have obtained prior leave of the Court under section 92 CPC and then institute the suit. In support of his submission, learned senior counsel relied upon the decision of this Court in PERIASAMI v. CHINNATHAMBI PADAYACHI (2001)3 MLJ 686) and G. VASANTHA PAI AND ANOTHER v. GANDHINAGAR COOPERATIVE HOUSE CONSTRUCTION SOCIETY LTD. AND ANOTHER

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(2002-3-LW 116). Mr.V.K.Muthusami, learned senior counsel submitted that the suit is bad for want of proper leave under section 92 C.P.C. and he relied upon the judgment of this Court in N.ANANDAN v. AYYANNA GOUNDER (AIR 1994 Madras 43) and submitted that the leave of the Court is a condition precedent to institute the suit under section 92 C.P.C. He also relied upon the decision of the Supreme Court in R.M.NARAYANA CHETTIAR v. N.LAKSHMANAN CHETTIAR (AIR 1991 SC 221) and submitted that the leave is a condition precedent for instituting suit against a public trust.

14. We have carefully considered the submissions of Mr.T.R.Mani, Mr.S.V.Jayaraman and Mr.V.K.Muthusami, learned senior counsel for the parties. The Supreme Court in R.M.NARAYANA CHETTIAR v. N.LAKSHMANAN CHETTIAR (AIR 1991 SC 221) has held that the leave of the Court is a precondition or a condition precedent to institute suit against a public trust for the reliefs set out in the said section and a suit instituted without the leave of the Court is not maintainable at all. The same view is reiterated by the Supreme Court in B.S.ADITYAN & ORS v. B.RAMACHANDRAN ADITYAN & ORS (2005-1-LW 661). Abdul Hadi,J. in N.ANANDAN v. AYYANNA GOUNDER (AIR 1994 Madras 43) has made distinction between the leave of the Court for instituting suit under section 92 CPC and the permission under Order 1 Rule 8 CPC to file suit in the representative capacity. Learned Judge after noticing the difference between the suit under section 92 CPC and the suit filed in the representative capacity, held that the suit under section 92 CPC is not similar in all respects to the suit filed in the representative capacity under Order 1 Rule 8 CPC. Learned Judge held that the leave under 92 CPC is a condition precedent to institute the suit itself. However, in the case before the learned Judge, the application under section 92 CPC was pending when the matter reached this Court against the order granting temporary injunction as well as against the order of the trial Court appointing a receiver and the learned Judge held that the leave under section 92 CPC is a condition precedent to institute the suit but, the order appointing receiver cannot be set aside. Learned Judge held that the order granting temporary injunction has to be set aside because, the language used in Order 39 R 1 CPC differs in material particulars from the language employed in Order 40 Rule 1 CPC. Learned Judge held that an application for the appointment of a receiver does not, in terms of Order 40, Rule 1 CPC, contemplate an already registered suit for the exercise of the power thereunder, and even while proceedings for leave under section 92 CPC are pending and the question of leave remains undecided, it is open to the court to entertain an application for appointment of receiver and deal with and dispose of the same in accordance with the law. Learned Judge, after noticing the decision of the Supreme Court in R.M.Narayana Chettiar v. N.Lakshmanan Chettiar (AIR 1991 SC 221), held that it cannot be concluded that the Supreme Court is of the view that no interim order at all could be passed pending disposal of the application under section 92 CPC. As far as the application for interim injunction is concerned, learned Judge held that temporary injunction cannot be granted.

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15. In PERIASAMI v. CHINNATHAMBI PADAYACHI (2001) 3 MLJ 686), a learned Judge of this Court has held that the suit cannot be entertained without leave of the Court, because the leave is a condition precedent for the purpose of maintaining the suit. The above decision is distinguishable as in that case, leave under section 92 CPC was not obtained from the court and hence, there was no difficulty for the learned Judge to hold that without leave being granted by the Court, the suit itself is not maintainable. In G.VASANTHA PAI AND ANOTHER v. GANDHINAGAR COOPERATIVE HOUSE CONSTRUCTION SOCIETY LTD. AND ANOTHER (2002-3- LW 116), a Bench of this Court has held that leave under section 92 is necessary and mandatory also and while considering the application seeking leave, it is not open to the court to decide the rights of the parties. The Bench of this Court, while granting the leave in respect of all the reliefs mentioned in the plaint, set aside the order restricting the leave for a portion of the relief sought for by the applicant.

16. There can be no quarrel over the proposition that the plaintiffs have to obtain leave of the Court under section 92 CPC. The plaintiffs in this case have filed the necessary application in I.A.No.195 of 1981 on 16.2.1981 and notice was ordered and the respondents took time to file counter affidavit and after a long delay, counter affidavit was filed and then, the matter was posted for enquiry. A petition to receive additional counter and to amend the original counter was filed and it was dismissed and thereafter, arguments were heard and posted for orders. In the meantime, on the petition filed by the respondents 4 and 5, the case was reopened and further arguments were heard and ultimately on 8.2.1982 orders were passed granting leave under section 92 CPC to the plaintiffs to institute the suit on behalf of Hindu Community and citizens of Gobichettipalayam. It is ex facie clear that the plaintiffs in this case have filed necessary application and the leave was also granted by the trial Court. It is also seen from the judgment of the trial Court that the trial Court found from the evidence let in by the plaintiffs that the two eo nominee plaintiffs have interest in the functioning of the trust and protecting its properties and that there was no serious cross-examination on this point. It is relevant to notice that no issue was framed regarding the maintainability of suit under section 92 CPC.

17. It is also relevant to notice the decision of this Court in B.S.ADITYAN V. KANNAN ADITYAN (AIR 1983 Madras 334) wherein the Division Bench held that once leave has been granted by this Court, it would not be possible for the persons who have obtained leave either to alter the name of the parties suing or substantially change the character of the suit or enlarge the scope of the suit without the sanction of the Court. This Court also held that the suit must be deemed to have commenced with the filing of the application for leave. The view of this Court is that the suit must be deemed to have commenced on the date of filing the application for leave and once the leave is granted, it relates back to the date of application. Though Mr.T.R.Mani, learned senior counsel has questioned the correctness of the decision of this Court in N.Anandan case

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(AIR 1994 Madras 43) holding that the trial Court has no power to consider an application for grant of interim injunction during the pendency of application under section 92 CPC, in our view, it is not necessary to consider the correctness of the decision. We are of the view that since the leave has been granted by the trial Court, the suit instituted on 16.2.1981 cannot be rejected merely on the ground that the leave has been granted under section 92 CPC during the pendency of the suit. It is also significant to notice that this Court, prior to the decision of the Supreme Court in R.M.NARAYANA CHETTIAR v. N.LAKSHMANAN CHETTIAR (AIR 1991 SC 221), was taking the view that notice to defendants is necessary before the grant of leave under section 92 CPC. The trial Court has ordered notice to the defendants in the application under section 92 CPC in view of the prevalent law laid down by this Court at that time. The Supreme Court has laid down the law in R.M.NARAYANA CHETTIAR V. N.LAKSHMANAN CHETTIAR (AIR 1991 SC 221) by judgment dated 11.10.1990 that prior notice to the defendant is not necessary for the grant of leave under section 92 CPC. We are therefore of the view that though the Court is empowered to grant leave without ordering notice, since the trial Court has ordered notice and after enquiry, granted leave, the act of the Court cannot be foisted on the plaintiffs to non-suit them.

18. In the present case, before granting leave under 92 CPC, the trial court considered two other applications. One of the applications dealt with by the trial Court was the application filed under section 80(2) CPC to dispense with the notice under section 80 CPC and the other application was filed seeking permission of the Court to file suit in representative capacity under Order 1 Rule 8 CPC. In so far as the application to dispense with the prior notice under section 80 CPC is concerned, we have already held that the notice is not necessary as the suit against the defendants 1 to 3 has not been filed for their acts done in official capacity. In so far as the application under Order 1 Rule 8 CPC is concerned, there is nothing wrong in considering the said application seeking permission to sue in representative capacity before the suit is taken up on file.

19. Mr.S.V.Jayaraman, learned senior counsel appearing for the respondents 4 and 5 submitted that the plaintiffs have no locus standi to file the suit, as in Ex.A-5 Will it is mentioned that the relatives have no right to claim the properties covered in the Will and the intention of the testator and the testatrix is clear to exclude all the relatives of both the testator and the testatrix from claiming any right in the properties and hence, the plaintiffs cannot claim any right whatsoever in the properties and the plaint is also vague as regards their interest in the properties. Mr.T.R.Mani, learned senior counsel submitted that since the trial Court has already granted the leave, this Court may not examine and decide the issue. We are unable to accept the submission of Mr.T.R.Mani, learned senior counsel that since the trial Court has granted the leave, this Court sitting in appeal may not reexamine the issue as the appeal is a continuation of the suit and we are of the view

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that this Court has the power to examine the question whether the leave under section 92 CPC has been properly granted and whether the applicants seeking leave have interest in the suit properties to maintain the suit. The Supreme Court in B.S.ADITYAN & ORS v. B.RAMACHANDRAN ADITYAN & ORS (2005-1-LW 661) has held that when a specific provision has been made in the Code of Civil Procedure in section 104(1)(ffa) allowing an appeal to be filed against an order refusing to grant leave to file a suit, the appeal filed by the respondents in that case before the Division Bench was competent. On the facts of the case, we are satisfied with the finding recorded by the trial Court that the eo-nominee plaintiffs have interest in the suit properties is sustainable. Their case is that a valid trust has been created and the defendants 4 and 5 have committed breach of trust. It is also clear from the reading of the plaint that they are persons from Gobichettipalayam and income from the properties of Palaniappa Chettiar and Rangammal are required to be utilised for the construction of a Chatram at Palani to be used by the Hindus and for Naivedyam during early morning pooja of Palani Andavar at Palani and for performing annadanam during Thai Poosam festival at Palani and for establishment of an educational institution at Gobi and also for building a maternity home in their names. In the plaint it is stated that the plaintiffs are residents of Gobichettipalayam and they have filed the suit in representative capacity representing the Hindu community people at Gobichettipalayam. It is also stated in evidence that they go to Palani. Therefore, it cannot be said that the plaintiffs have no interest at all in the proper administration of the trust and its properties. It is also relevant to notice that in the plaint filed by them, they have not prayed for any costs which indicates that the suit has been instituted in a bona fide manner for framing a proper scheme to administer the trust and its properties.

20. Mr.V.K.Muthusami, learned senior counsel referred to C.M.P.No.5356 of 2004 filed before this Court under Order 41, Rule 27 CPC to receive two additional documents. The first document that is sought to be introduced is the order of Tahsildar, Gobichettipalayam passed in M.M.No.97081/A3, dated 24.3.1981 and according to him, the said document proves that the plaintiffs have not come to the Court with clean hands and their real intention is to grab the properties. The second document sought to be relied upon is the copy of plaint in O.S.No.40 of 1996 on the file of Sub Court, Gobichettipalayam which is said to have filed by the grandchildren of the first plaintiff and according to the learned senior counsel, the suit in O.S.No.40 of 1996 has been filed for declaration of title to the trust properties which shows the real intention of the plaintiffs.

21. The Supreme Court in KARNATAKA BOARD OF WAKF v. GOVERNMENT OF INDIA AND OTHERS (2005-1-LW 730) has held that the scope of Order 41, Rule 27 CPC is clear to the effect that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, unless they have shown that in spite of due diligence, they could not produce such documents and such documents are required to enable the

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court to pronounce proper judgment. In so far as the first document is concerned, though it is stated that the said document was produced before the trial Court, there is nothing to show that the document was produced before the trial Court and marked as an exhibit in the suit. The document is dated 24.3.1981 and the suit was instituted on 16.2.1981 and the 9th respondent had opportunity to produce the same before the trial Court as the suit was disposed of by the trial Court on 2.2.1989. The 9th respondent has also not given any convincing reason for not producing the same before the trial Court. Further the said document is also not very relevant as the Tahsildar merely directed the first eo-nominee plaintiff to establish his right in civil Court and it does not show that the first eo-nominee plaintiff was interested in grabbing the suit properties.

22. In so far as the second document is concerned, it is a plaint in O.S.No.40 of 1996 on the file of Sub Court, Gobichettipalayam and it is stated that the suit has been filed by the grandchildren of the first eo-nominee plaintiff, Chenniappa Chettiar. In the plaint in O.S.No.40 of 1996 a reference has been made to the finding of learned trial Judge in O.S.No.76 of 1981, which is the subject matter of appeal before us, that the Will dated 27.9.1968 (Ex.A-5) is a true and genuine Will but, under the Will no trust was created by Palaniappa Chettiar and his wife Rangammal and after the life time of Palaniappa Chettiar, his wife Rangammal became full and absolute owner of his properties and she was entitled to deal with the properties as an absolute owner after the life time of Palaniappa Chettiar. A further reference has been made in the plaint to the findings in O.S.No.76 of 1981 wherein it was held that the Will dated 27.11.1980(Ex.B-109) said to have been executed by Rangammal is not true, valid and it was not executed by Rangammal in her sound disposing state of mind. The plaintiffs in that plaint also referred to the appeals pending on the file of this Court. They have also referred to the proceedings for appointment of receiver. They have stated that if the Higher Court which is seized of the matter ultimately holds that a trust was created by Palaniappa Chettiar and his wife and concludes that the suit properties are trust properties, the plaintiffs are willing to abide by such decision and give up all their private rights and claims over the suit properties. It is stated that the suit has been instituted only to save the period of limitation in case the findings of the trial Court are upheld by this Court or the highest Court. We are of the view that the subsequent suit filed by the grandchildren of one of the eo-nominee plaintiff would not in any way establish that the applicants who filed the application for leave under section 92 CPC have no interest in the properties and their intention is not bona fide and with a view to grab the properties they have filed the suit. Hence, we are unable to accept the submission of Mr.V.K.Muthusami, learned senior counsel that the application under section 92 CPC should have been rejected by the trial Court.

23. Even assuming that the suit was not properly instituted before the grant of leave under section 92 CPC, we are of the view that once the

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leave has been granted, it would take effect from the date of order and it must be held that the suit was validly instituted. The Orissa High Court in KINTALI CHINA JAGANADHAM v. K.LAXMI NAIDU (AIR 1988 Orissa 100) has held that there is nothing wrong in taking the suit as being instituted from the date on which the leave under section 92 CPC was obtained. Viewed the matter from any angle, we hold that the suit was validly instituted.

24. Though it is stated that the first eo-nominee plaintiff is dead during the pendency of the appeal, we are of the view, since the suit has been properly instituted in accordance with section 92 CPC, there is nothing in the section which says that the suit cannot be continued if one of the original plaintiffs, who obtained permission and filed the suit along with the other plaintiffs dies or withdraws from the suit subsequent to the institution. Hence, the death of the first eo-nominee plaintiff does not in any way affect the institution of the suit or the continuation of the appeal.

NATURE AND CHARACTER OF WILL DATED 27.9.1968 (Ex.A-5):

25. The main question that arises in the appeal is regarding the construction of the Will Ex.A-5. The Will was executed on 27.9.1968 by Palaniappa Chettiar and his wife Chinnammal @ Rangammal. It was registered in the Office of Sub Registrar, Gobichettipalayam on the same day. The Will is not disputed by the defendants 4 and 5. As a matter of fact, the defendants 4 and 5 claim rights under the Will of Chinnammal @ Rangammal dated 27.11.1980 (Ex.B-109) and in that Will dated 27.11.1980, the Will of Palaniappa Chettiar and Rangammal dated 27.9.1968 is referred to. Though in the written statement filed, the defendants 4 and 5 have not admitted the execution and attestation of the Will dated 27.9.1968, they have claimed rights under the Will dated 27.11.1980 in which there is a reference to the Will dated 27.9.1968. The averment made in the written statement is that the Will dated 27.9.1968 cannot be construed to create a trust. The plaintiffs, however, out of abundant caution, have taken steps to examine P.W.2, the Sub Registrar who registered the Will Ex.A-5 and P.W.3 one of the attestors of the Will, Ex.A-5. It is a matter of evidence that the first attestor, Venkataranga Aiyar is dead and the whereabouts of the second attestor, Arumugham is not known. The third attestor who is a retired Sub Registrar has been examined. He was an attestor, besides he was the scribe. Learned counsel for the respondents have not seriously disputed the due execution and attestation of the Will dated 27.9.1968.

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26. The next question that arises is regarding the construction of the Will, Ex.A-5 and therefore, it will be appropriate to refer to the relevant portion of the Will. The Will was jointly executed by Palaniappa Chettiar and his wife Chinnammal @ Rangammal on 27.9.1968 and it was registered and the relevant portion of the Will reads as under:-

"ஸ்ரீ ராமஜெயம் 1968-ம் வருடம் செப்டம்பர் மாதம் 27-ம் தெதிக்கு சரியான தமிழ் கீலக வருஷம் புரட்டாசி மாதம் 11-ம் தெதி கோபி செட்டிபாளையம்

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தாலுக்கா வீரபாண்டி கிராமம் கஸ்பாவிலிருக்கும் சிறுவலூர் அங்கம்பாளையம் நாராயண செட்டியார் குமாரர் நா.பழனியப்ப செட்டியார் (1) மெற்படியார் மனைவியும் கருப்பண செட்டியாரின் கமாரத்தியுமான சின்னம்மாள் என்கிற ரங்கம்மாள் (2) ஆகிய நாங்கள் இருவரும் ஏகோபித்து எங்கள் பூரண சம்மதியில் எழுதி வைத்த உயில் பத்திரம். எங்களுக்கு கலியாணமாகி நீண்டகாலமாகியும் யாதொரு சந்ததியும் ஏற்படாத காரணத்தாலும் இனிமேற்கொண்டும் சந்தான விருத்திக்கு யாதொரு ஏதுவும் இல்லாததாலும் மேற்கொண்டு எவரையும் தத்து எடுத்துக் கொள்ள முடியாத சூழ்நிலை இருப்பதாலும் இனி நாங்கள் நீண்ட நாள் ஜீவிப்போம் என்ற நம்பிக்கையில்லாததாலும் நாங்கள் இருவரும் சுயமாய் சம்பாதித்த எங்கள் சொத்தில் எங்கள் ஜீவதிசைக்கு பிறகு எங்கள் உறன்முறையார்கள் எவரும் எவ்வித பாத்தியதையும் எக்காரணத்தைக் கொண்டும் அனுபவிக்க அருகதையில்லாததாலும் எங்கள் சொத்தின் பேரில் வேறு எவரும் எந்தவிதமான சொந்தம் பாராட்டி உரிமை கொண்டாடி எக்காரணத்தைக் கொண்டும் எக் கோர்ட்டிலும் எந்தவிதமான விவகாரம் தொடராமலும் இருக்கும் பொருட்டு இந்த உயில் பத்திரம் எழுதி ரிஜிஸ்தர் செய்துள்ளோம். இதன்படி நாங்கள் சுயார்ஜிதமாய் சம்பாதித்த இதனடியில் கண்ட சொத்துக்களை எங்களில் இருவர் ஜீவதிசைக்குள் யார் ஒருவர் காலமாகிவிட்டாலும் எஞ்சியுள்ளவர் எங்கள் பூரா சொத்துக்களையும் சர்வசுதந்திரமாய் ஆண்டு அனுபவித்து அவர் ஜீவதிசைக்கு பின் மீதி உள்ள சொத்துக்களின் வருமானத்தை எல்லாம் கீழ் கண்டவாறு தர்மகாரியங்களுக்கு மட்டும் சொத்துக்களை வினியோகம் செய்யாமல் வருமானத்தை கொண்டு தான் செலவு செய்து வரவேண்டியது. இந்த உயில் சாசனத்தை, எங்கள் ஜீவதிசைக்குள் மாற்றவும் ரத்து செய்யவும் வேறு பத்திரம் எழுதவும் எங்கள் இருவருக்கும் ஒருமித்தும் தனித்தும் பூரண உரிமை உண்டு. இந்த பத்திரமாவது எங்கள் ஜீவிய காலத்திற்கு பின்புதான் அமுலுக்கு வரத்தக்கது. எங்கள் ஜீவதிசைக்குள் இந்த சொத்துக்களை நாங்களே பரிபாலித்து எங்களுக்குஇஷ்டமான தர்மங்களை நாங்களே செய்ய எங்களுக்கு தனித்தோ ஒருமித்தோ பூரண உரிமை உண்டு. அவ்வாறு எங்கள் ஜீவதிசைக்குள் நாங்கள் செய்ய விரும்பும் தர்மங்களை செய்ய இயலாது போனால் கீழ்கண்ட அதிகாரிகள் கொண்ட ஓர் கமிட்டியை ஏற்படுத்தி கீழ்கண்டவாறு தர்மம் செய்து வரவேண்டியது. தர்மங்களின் விவரம் (1) பழனியில் எங்கள் இருவர் பெயரால் நல்லதோர் சத்திரம் கட்டி அதைத் தர்மத்திற்காக சகல உறிந்துக்களும் இலவசமாக உபயோகித்துக் கொள்ள ஏற்பாடு செய்ய வேண்டியது. இதன் நிர்வாகம் எண்டௌமெண்ட் கமிஷனரைச் சேர்ந்தது (2) பழனியில் பழனியாண்டவருக்கு நிரந்தரமாக விடியற்கால பூஜைக்கு வேண்டிய நைவேத்தியங்களை கொடுக்க எங்கள் சொத்தின் வருமானத்திலிருந்து ஓர் பாகத்தை செலவு செய்து கொள்ள வேண்டியது (3) பழனியில் தை பூச விழாவின் போது எங்கள் இருவர் பெயரால் ஏழைக்களுக்கு அன்னதானம் செய்ய எங்கள் சொத்தின் வருமானத்தில் இருந்து ஓர் பாகத்தை உபயோகித்துக் கொள்ள வேண்டியது. (4) நாங்கள் முன்னேற்றமடைந்த கோபிசெட்டிபாளையத்தில் எங்கள் இருவர் பெயரால் கல்வி நிலையம் ஒன்றை ஏற்படுத்தி அதை சர்க்கார் நிர்வாகத்திற்கோ அல்லது நகராட்சி நிர்வாகத்திற்கோ விட்டுவிட வேண்டியது அதற்கு வேண்டிய செலவிற்கும் எங்கள் சொத்தின் வருமானத்தின் ஓர் பாகத்தை உபயோகித்துக் கொள்ள வேண்டியது. (5) இதே கோபிசெட்டிபாளையத்தில் எங்கள் சொத்தின் வருமானத்திலிருந்து எங்கள் இருவர் பெயரால் பிரசவ விடுதி ஒன்று கட்டி அதை சர்க்கார் நிர்வாகத்திற்கு விட்டுவிட வேண்டியது. மேற்படி தர்மங்களை நடத்த மூன்று பேர்கள் அடங்கிய கமிட்டியின் விவரம் (1) கமிட்டியின் நிறந்தர தலைவர் எண்டௌமெண்ட் கமிஷனர் கமிட்டியின் மற்ற நிறந்தர இரண்டு மெம்பர்களின் விவரம், கோபிசெட்டிபாளையம் ரெவின்யூ டிவிஷனல் ஆபீசர் (2) கோபிசெட்டிபாளையம் டிஸ்ரிகட் முன்சீப்பு (3) ஆகிய இம்மூவரும் தான் மேற்படி தர்மங்களை நடத்தி வரவேண்டியது. இம்மூவருக்கும எங்கள் சொத்துக்களை

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விநியோகம் செய்ய உரிமையில்லை. சொத்தின் வருமானத்தை தான் செலவ , செய்ய உரிமை உண்டு. இதற்கு முன் எழுதிய (1956-ம் வருத்திய 19 நெ. உயில்) பத்திரம் தானாகவே ரத்தாக கடவது."

27. At the time when the Will was executed, Palaniappa Chettiar was aged 85 years and Chinnammal @ Rangammal was aged 78 years. In the Will, they have stated that they had no issues in spite of their long married life and there was no chance for the birth of any child for them and they had no intention to adopt anyone also. The Will goes on to the effect that they had no hope of living for a long period and the Will was executed by them after both of them unanimously agreed and after their full consent. The Will stipulates that during their life time and after their life time, none of the relatives should enjoy their properties for any reason and no relative of them should also claim any right over the properties. The Will goes on to provide that the will has been executed to prevent anyone from going to Court and prevent any proceedings that may be initiated in any court in respect of the properties. The Will further goes on to provide that out of the properties belonging to them, if anyone of them dies, the survivor may enjoy the entire properties absolutely and after the survivor's life time and from the remaining properties and the entire income therefrom, the charities should be performed without any alienation and out of the income, the charities should be performed. The Will also stipulates that the testators have the right to cancel the Will during their life time either individually or jointly. The Will also emphasises that during the life time, the testators have the full right to manage the properties and they also have the power to do Dharmakariyam of their own choice. The Will further goes on to provide that during their life time, if they find that they could not perform the charities, a committee should be constituted after their lifetime through which the charities which are specified in the Will should be performed. We have already set out the specified objects of the charities in the earlier part of the judgment.

28. The question that arises is whether the Will Ex.A-5 is a joint Will or a joint and mutual Will. We find that it is a well-thought out Will. Palaniappa Chettiar had experience in making Wills. It is evidence on record that he had already made two Wills and subsequently revoked both of them. Since he was a person familiar in making Wills, it is clear that after due deliberation, both of the testator and the testatrix must have executed the Will Ex.A-5.

29. Before considering the arguments of learned senior counsel for the second appellant and learned senior counsel for the respondents, we are of the view, it is necessary to refer to the law on the subject. In Halsbury's Law of England(LordHailsham of St.Marylebone Edition) (IV Edn. Vol. 50,at pages 185,186,198&199), the learned author considered the essential characteristics of a joint Will and that of a mutual Will, and the relevant passage reads as under:-

257. Joint Wills: A joint Will is a Will made by two

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or more testators contained in a single document, duly executed by each testator, and disposing either of their separate properties or of their joint property. It is not, however, recognised in English law as a single Will. It is in effect two or more Wills; it operates on the death of each testator as his Will disposing of his own separate property; on the death of the first to die it is admitted to probate as his own Will and on the death of the survivor, if no fresh Will has been made, it is admitted to probate as the disposition of the property of the survivor. Joint Wills are now rarely, if ever, made."

258. Mutual Wills: Wills are mutual when the testators confer upon each other reciprocal benefits, which may be absolute benefits in each other's property, or life interests with the same ultimate disposition of each estate on the death of the survivor. Apparently, a mutual Will in the strict sense of the term is a joint Will, but where by agreement or arrangement similar provisions are made by separate Wills, these are also conveniently known as mutual Wills. Wills which by agreement confer benefit on persons other than the testators, without the testators conferring benefits on each other, can also be mutual Wills. Where there is an agreement not to revoke mutual Wills and one party dies having stood by the agreement, a survivor is bound by it."

271. Restrictions under an agreement to make mutual Wills: Mutual Wills may be made, either by a joint Will or by separate Wills, in pursuance of an agreement that they are not to be revoked. Such an agreement may appear from the Wills, or may be proved outside the Wills, but it must be a legally binding contract; and such a contract is not established by the mere fact that the Wills are in identical terms. If no such agreement is shown, each party remains free to revoke his Will, if there are separate Wills, or to revoke the joint Will, so far as it disposes of his property, and the fact that one party has died without revoking the disposition of his property does not prevent the survivor from revoking the disposition which he has made, notwithstanding that he has received benefits out of the estate of the deceased party. Even when there is such an agreement and one party has died after departing from it by revoking or altering the Will, the survivor having notice of the breach cannot claim to have the other's revocation or alteration of his Will set aside, since the notice gives him the chance of altering his own Will as

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regards his own property; and the death of the deceased party is itself sufficient notice for this purpose. Even a fairly minor departure by the first to die from the agreed dispositions, without the survivor's knowledge or agreement, Will release the survivor from the agreement. If, however, the party who has died has stood by the agreement and not revoked or altered his Will, the survivor is bound by it, and, although probate Will be granted of a later Will made by the survivor in breach of the agreement, since a court of probate is only concerned with the last Will, the personal representatives of the survivor nevertheless hold his estate in trust to give effect to the provisions of the mutual Wills. Effect is given to the obligation by a floating, constructive trust which crystallises on the death of the survivor. Where mutual Wills, whether contained in a joint Will or in separate documents, relate to joint property, the agreement to make the mutual Wills, and the making of the dispositions in pursuance of the agreement, sever the joint tenancy and convert it into a tenancy in common."

30. In Halsbury's Law of India, Vol.8 (2001 Edn., at pages 22 and 23), the learned author described the mutual Will and the joint Will as under:

"(300.018) Mutual Will: A Will is mutual when two testators confer upon each other reciprocal benefits, as by either of them constituting the other his legatee; that is to say when the executants fill the roles of both testator and legatee towards each other. But where the legatees are distinct from the testators, there can be no mutual Will. A mutual Will is a mode of disposition to ascertain beneficiaries by two persons. Mutual Wills are also called reciprocal Wills and are generally founded on contract for their execution. A joint mutual Will becomes irrevocable on the death of one of the testators if the survivor had received benefits under the mutual Will, and there need not be a specific contract prohibiting revocation when the arrangement takes the form of not two simultaneous mutual Wills but one single document.

(300.019) Joint Will: A joint or conjoint Will is a testamentary instrument executed by two or more persons, in pursuance of a common intention, for the purpose of disposing of their several interests in property owned by them in common, or of their separate property treated as a common fund, to a third person or persons. However, where it deals with a joint interest of the persons executing it, like a mutual

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Will, if one person takes a benefit under it, he forfeits his right to revoke his part of the disposition by his conduct. A joint Will is valid as regards the property of each testator and a probate may be granted on the death of the first and again on the death of the survivor. Sometimes a joint Will executed by members of a joint family may operate as a family arrangement and, therefore, a Will. It becomes operative immediately after the death of anyone of the testators so far as his properties are concerned and is not postponed till the death of all."

31. In Theobald on Wills', 12th Edition, pages 28 and 29, at paras 79 and 80, the learned author has described the difference between 'joint Wills' and 'mutual Wills' as under:

"Joint Wills:- Persons may make joint Wills, which are, however, revocable at any time by either of them or by the survivor. A joint Will is looked upon as the Will of each testator, and may be proved on the death of one. But the survivor will be treated in equity as a trustee of the joint property if there is a contract not to revoke the Will; but the mere fact of the execution of a joint Will is not sufficient to establish a contract not to revoke. So a legacy to a legatee who survived the first testator, but predeceased the second, did not lapse. Where a joint Will is followed by a separate Will which is conditional on a condition that fails, the joint Will is not revoked even though the subsequent separate Will contains a revocation clause.

Mutual Wills:- The term 'mutual Wills' is used to describe separate documents of a testamentary character made as the result of an agreement between the parties to create irrevocable interests in favour of ascertainable beneficiaries. The revocable nature of the Wills under which the interests are created is fully recognised by the court of probate; but, in certain circumstances, the court of equity will protect and enforce the interests created by the agreement despite the revocation of the Will by one party after the death of the other without having revoked his Will."

32. In 'Treatise on Wills' by Thomas Jarman (8th Edition, Vol.10), learned author has observed as to what is meant by joint Wills as under:-

"Two or more persons may make a joint Will, which, if properly executed by each, is so far as his own property is concerned, as much his Will, and is as well entitled to probate upon his death, as if he had

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made a separate Will. But a joint Will made by two persons, to take effect after the death of both, will not be admitted to probate during the life of either joint Wills are revocable at any time by either of the testators during their joint lives, or after the death of one of them, by the survivor."

33. In the Indian Succession Act by B.B.Mitra (13th Edition, at pages 26 and 27, learned author has made the following observations on the joint Will and mutual Will:

"Joint Will: A joint Will is a Will made by two or more testators contained in a single document, duly executed by each testator, disposing either of their separate properties or of their joint property. It is not, however, recognised in the English law as a single Will. It operates on the death of each testator as his Will disposing of his own separate property, and is in effect two or more Wills.

Two persons can make a joint Will. Where two persons make joint Wills, and one of them dies, the survivor can revoke his Will, unless he has taken some benefit under the Will of the deceased co-testator."

Mutual Wills: A Will is mutual when two testators confer upon each other reciprocal benefits, as by either of them constituting the other his legatee; that is to say, when the executors fill the roles of both testator and legatee towards each other. But where the legatees are distinct from the testators, there can be no question of a mutual Will.

Mutual Wills, as distinct from joint Wills, are sometimes described as reciprocal Wills. In describing a Will the adjective 'mutual' or 'reciprocal' is used to emphasise and denote the contractual element which distinguishes it from a joint Will. A joint mutual Will becomes irrevocable on the death of one of the testators if the survivor had received benefits under the mutual Will. There need not be a specific contract prohibiting revocation when the arrangement takes the form of not two simultaneous mutual Wills, but one single document. If one single document is executed using the expressions, 'our property', 'our present wishes', 'our Will' and such similar expressions, it is strong cogent evidence of the intention that there is no power to revoke except by mutual consent."

34. Though learned senior counsel for the parties have referred to number of decisions on this topic, in our view, each case depends upon the construction of the Will concerned, but the principles laid down in those

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case are useful in considering the question whether Ex.A-5 Will is a joint Will or joint and mutual Will. Hence, we refer to some of the judgments. It is profitable to refer to the leading case in England in DUFOUR v. PEREIRA (1769) 21 ER 332). In that case, a husband and wife executed a mutual Will and after the death of the husband the wife proved the mutual Will and afterwards made another Will, revoking the mutual Will, and it was held that the wife had no authority to revoke the mutual Will. The judgment was delivered by Lord Camden and the learned Judge observed as under:-

> " This question arises on a mutual Will of the husband and wife the Will is jointly executed by them. What the wife disposed of, is the residue of her aunt's estate, given to her by her Will.
>
> I do not find the cases go so far, as to consider a legacy to a wife, as excluding the husband by implication; but there is no occasion to determine that question.
>
> The question is, as the husband by the mutual Will assents to his wife's right, and makes it separate, whether the second Will by the wife is to be considered as void.
>
> It struck me, at first more from the novelty of the thing than its difficulty. The case must be decided by the laws of this country. The Will was made here; the parties lived here; and the funds are here. Consider how far the mutual Will is binding, whether the accepting of the legacies under it by the survivor, is not a confirmation of it. I am of opinion it is.
>
> It might have been revoked by both jointly; it might have been revoked separately, provided the party intending it, had given notice to the other of such revocation. But I cannot be of opinion that either of them could, during their joint lives, d it secretly; or that after the death of either, it could be done by the survivor by another Will.
>
> It is a contract between the parties, which cannot be rescinded, but by the consent of both. The first that dies, carries his part of the contract into execution. Will the court afterwards permit the other to break the contract? Certainly not.
>
> The defendant Camilla Rancer hath taken the benefit of the bequest in her favour by the mutual Will; and hath proved it as such she hath thereby certainly confirmed it; and therefore, I am of the opinion, the last Will of the wife, so far as it breaks in upon the mutual Will, is void.
>
> And declare, that Mrs.Camilla Rancer having proved the mutual Will, after her husband's death; and having

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possessed all his personal estate, and enjoyed the interests thereof during her life, hath by those acts bound her assets to make good all her bequests in the said mutual Will; and therefore let the necessary accounts be taken."

35. The above statement of law dealt with by Lord Camden came up for consideration in number of subsequent cases in England and in our view, it is not necessary to refer to all the subsequent cases, except the decision of chancery Division in *In re, Oldham Hadwen v. Myles* (1925 Ch 75) and Gray v. Perpetual Trustees Co. (1928 AC 391) and the decision of Chancery Division in Re Cleaver (deceased) Cleaver v. Insley and others (1981) 2 All ER 1018) and Re Goodchild (deceased)Goodchild and another v. Goodchild (1997) 3 All ER 63(CA) wherein the principles to differentiate the mutual Wills from joint Wills are discussed.

36. As far as India is concerned, this Court in MINAKSHI AMMAL v. VISWANATHA AIYAR (ILR 33 Mad 406) has held that where two persons agree to make mutual Wills and one of them dies, the survivor cannot revoke his Will if he has taken some benefit under the Will of the deceased testator. Sir Arnold White, C.J., in his separate judgment on the construction of the Will held that it was not a mutual Will as there was nothing which gave the surviving testator or testatrix a benefit on the death of the testator or testatrix who predeceased the other. Krishnaswami Ayyar,J. in his separate judgment as held as under:-

"... the dispositions contained in this Will are dispositions by each of his or her own property and as the plaintiff has not started his case with any allegation of an arrangement between the two, it seems to me that the plaintiff is bound to fail on this very ground. But assuming that there was an arrangement to be implied from the language of this instrument, even then it is clear on the authorities that it cannot be said that the Wills are irrevocable. For, it is plain upon the cases that have been discussed that, in order that the Will should be irrevocable, it is necessary that the person attempting to revoke it should have received a benefit under the Will of the other."

37. The next case of importance is the Bench decision of this court in KUPPUSWAMI v. PERUMAL (AIR 1964 Madras 291) wherein Ramamurti,J. tracing the law from Roman Dutch Law relating to joint and mutual Wills and after referring to earlier decisions in India as well as in England and also after referring to Corpus Juris Secundum and after referring to the decision of this Court in Meenakshi ammal v. Viswanatha Aiyar (ILR 33 Madras 406) and the decision of Allahabad High Court in Bhavani Prasad v. Surendra Bala (AIR 1960 All 126) held as under:-

"We confess that the matter is not free from difficulty. But after a careful consideration of all

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the aspects of the matter, we are inclined to take the view that a joint mutual Will becomes irrevocable on the death of one of the testators if the survivor had received benefits under the mutual Will, and that there need not be a specific contract prohibiting revocation when the arrangement takes the form of not two simultaneous mutual Wills but one single document. In fact in some of the cases referred to above this aspect that if the two testators had executed one single document as one single mutual Will the position may be different is actually adverted to. In our opinion, if one single document is executed by both the brothers using the expressions 'our property, 'our present wishes' 'our Will' and such similar expressions, it is strong cogent evidence of the intention that there is no power to revoke except by mutual consent".

Learned Judge after considering relevant case laws laid down the tests as to when mutual Will is irrevocable in para-24 of the judgment which runs as under:-

" From the above discussion of the relevant cases, it will be clear that under the English law in order to render mutual Wills irrevocable, both the conditions must be concurrently satisfied; (a) the surviving testator must have received benefits from the deceased under the mutual Will and (b_ the mutual Wills should have been executed in pursuance of an agreement that the testators shall not revoke the mutual Wills. Such an agreement not to revoke the Wills may either appear from the Wills themselves or may be proved outside the Wills. Vide 39 Halsbury 3rd Edn. by Lord Simonds page 553, para 1289 and 1914 P.192."

Anantanarayanan,J. (as His Lordship then was) in para-50 of the same judgment after referring to the decision of the Supreme Court in Govindan Katmal v. T.T.Lakshmiamma (AIR 1959 SC 71) made the following observation:

"Their Lordships would appear to have laid emphasis upon the form of a mutual Will, in which each party is in a relationship o both testator and legatee, as regards the other party. Such terms would, by themselves, constitute powerful evidence of a mutual agreement not to revoke, except by both together. Hence, I do not think that this decision implies that the element of irrevocability may be dispensed with, as a test."

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38. In this connection, the decision of the Supreme Court in GOVINDAN KATMAL v. T.T.LAKSHMIAMMA (AIR 1959 SC 71) is of importance wherein the Supreme Court has laid down the law as to when a Will can be regarded as a mutual Will and held as under:-

> " A Will is mutual when the two testators confer upon each other reciprocal benefits as by either of them constituting the other his legatee that is to say, when the executants fill the roles of both testator and legatee towards each other. But where the legatees are distinct from the testators, there can be no position of a mutual Will"

It is relevant to notice that in K.Govindan case, the Supreme Court has not considered the case of mutual Will, but a joint Will. On construction of the Will in question before it, the Supreme Court found that the Will has not created any right inter se on the testators and it only vested the title to the properties disposed of by it with the legatees on the death of the testators and in this view of the matter, the Supreme Court held that it was a case of three Wills combined in one and it was a joint Will and the Will could not be construed as a mutual Will.

39. The decision in DILHARSHANKAR v. CONTROLLER OF E.D., AHMEDABAD (AIR 1986 SC 1707) is a case of great relevance for the purpose of deciding the controversy that arises in the appeals. The Supreme Court in Dilharshankar case in para-40 of the judgment has quoted the observation of this Court in Kuppuswami case (AIR 1964 Madras 291) and laid down the law as under:-

> " In order to render mutual Will irrevocable, both, according to the said decision, the conditions must be concurrently satisfied:
>
> (a) that the surviving testator must have received benefits from the deceased under the mutual Will; (b) the mutual Wills should have been executed in pursuance of an agreement that the testators shall not revoke the mutual Wills. Such an agreement not to revoke the Wills may either appear from the Wills themselves or may be proved outside the Wills. This judgment was dissented from by the judgment under appeal."

The Supreme Court in para-49 of the judgment when construing the Will in question held as under:-

> "Therefore the Will must be construed in its proper light and there must be definite agreement found from the tenor of the Will or aliunde that either of the joint executants would not revoke the Will after receiving the benefit under the Will. Such definite agreement need not be express; it can be implied. The terms of the Will have been set out exhaustively. It was undoubtedly a joint Will. The

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property in question has been described as 'our property'. The expression 'owner' has also been used in the manner indicated in the sentence 'During our lifetime we shall continue to be the joint owners of the land bungalow and blocks with their common bath rook and two privies ... and shall be jointly entitled to the rents and income of the said land and blocks and the user and rent of the bungalow'. The Will goes on further to say that on the death of one of them, the survivor shall become the 'owner of .... and shall become entitled to the rents and income and user of the said land bungalow and blocks including garage ... therefore it is clear that the ownership which the joint executants contemplated was the user during the lifetime and entitlement to the rents and income of the same. It is this ownership which was to pass on the death of either of them to the survivor and the Will thereafter goes on to say that 'the provisions hereinafter contained shall become effective after the death of the survivor of us'. And thereafter after the death it is provided 'we hereby devise and bequeath our said furnished bungalow ....' The gift of the property to the three grand children as owners in full sense is to take effect on the death of the survivor of both the executants. It is clear that the property was intended to be kept in tact for the enjoyment of the ultimate legatees and during the life time of either of them the property would not in any way be parted with or diminished. This intention, expressed in the implied terms in the bargain in the Will, in our opinion, would be fortified by devising the property to three grand children in species, i.e., in specific form and not providing for any money or compensation for diminution of any part thereof before coming into effect of the Will in question. If that is the position then, in our opinion, there is a definite agreement not to revoke the Will by one of the executants after he or she has received the benefit under the Will on the death of either of them."

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In para-50 of the judgment the Supreme Court has made the following observation:

" Indubitably in the instant case the husband has received the benefit under the Will of the wife. He could not have during his lifetime parted with the property i.e. he did not have the disposing power over the properties in question after the death of the wife."

In para-52 of the judgment, the Supreme Court on the construction of the

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Will pointed out the dominant intention of the executants in the execution of the Will and held that the Will may be revoked during the lifetime of both the executants but after the death of one of the executants and after benefit had been received by the survivor, the property in question must remain intact to be enjoyed by the grand children by the terms of the Will which was to become effective on the death of both of the executants. In para-53 of the judgment, the Supreme Court laid down the propositions which are relevant for the purpose of this case as under:-

> " 1. The above question would depend on the construction of the joint Will -did it create any mutuality among the executants of the joint Will? Whether Kamlashankar Gopalshankar having accepted the benefit and after his wife's death, was competent to do anything contrary to the ultimate bequest? Before the death of the first of the executants the agreement remained contractual one in consideration of mutual promises. It could have been at that stage revoked by mutual agreement or even by unilateral breach, giving rise at the most to an action for damages. But after the death of the first one without revoking his or her own Will makes the joint Will irrevocable by the survivor [See Theobald (supra)]. But there must be an agreement that the Wills would not be revoked after the death of one of the executants or disposition will not be made contrary to the Will after the death of one of the executants. Such an agreement may appear from the Will or may be proved outside the Will but that is not established by the mere fact that the Wills are in identical terms. If such an agreement is shown each party remain bound.
>
> 3. A different and separate agreement must be spelled out not to revoke the Will after the death of one of the executants. That agreement must be clear though need not by a separate writing but must follow as a necessary implication which would tantamount to an express agreement."

We have quoted the relevant passages from the decision of the Supreme Court in Dilharshankar case (AIR 1986 SC 1707) in extenso as they are relevant for the purpose of deciding the controversies that arise in the appeal.

40. Mr.T.R.Mani, learned senior counsel for the second appellant referred to the decision of Kerala High Court in JANAKI v. KRISHNAN & ORS. (1964) 1 KLR 4) and the decision of Mysore High Court in LEO SEQUIERA v. MAGDALENE (AIR 1971 Mysore 143) and also the decision of Delhi High Court in MEERA DEWAN v. SHAKUNTALA DEWAN (AIR 2002 Delhi 321). We have gone through the decisions cited by learned senior counsel for the appellants.

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41. It is in the light of the above legal principles, the submissions of learned senior counsel for the parties have to be considered. Mr.T.R.Mani, learned senior counsel submitted that the Will Ex.A-5 is a mutual Will and the Will was executed by both Palaniappa Chettiar and Rangammal in a single document and on the death of one of the testators, the survivor received the benefit of the bequest and after receiving the benefit, she had no power to revoke the Will. Learned senior counsel submitted that Rangammal after receiving the benefits cannot disown the responsibilities as the intention of the testator and the testatrix was to give the entire properties to the named charities. He submitted that the expression, '*ஏகோபித்து*' (unanimously) in the Will clearly shows that there was a mutual agreement between the testator and the testatrix and the execution of the Will is based on mutual understanding arrived at by both of them and the object of the Will is to perform charities. Learned senior counsel submitted that both the executants of the Will were at advanced age and they wanted to confer some spiritual benefit on them after they depart from this world and social benefit to Gobichettipalayam, the town in which they prospered and the meaning of the expression, '*சர்வ சுதந்திரமாய்*' (absolutely) in the Will has to be cut down and should be read to mean that Rangammal has the right of enjoyment of the income from the property. Learned senior counsel submitted that Rangammal did not get the properties by inheritance and there was a reciprocal, mutual agreement between Palaniappa Chettiar and Rangammal and she received the benefit under the Will. Learned senior counsel submitted that both of them had entered into a mutual arrangement and in the concept of joint disposition and mutual agreement, the surviving testatrix, Rangammal has no right to execute any other Will after receiving the benefits under the Will and Rangammal has no power to alienate the properties. Learned senior counsel submitted that the purpose of the Will is to perform charities and the bequest to charities should not be defeated by any act of Rangammal as the intention of the testator and the testatrix is only to do charities. Learned senior counsel submitted that the surviving testatrix cannot go against the Will and the alienation and the subsequent Will executed by her are not valid in the eye of law. Learned senior counsel submitted that the Will has to be read as a whole and only during their joint lifetime, the makers of the Will may have the right to revoke the Will jointly and after Rangammal became legatee and after receiving the benefits under the Will, she had no power to revoke the Will. Learned senior counsel strongly relied upon the decisions in Minakshi ammal case (33 ILR Madras 406), Kuppuswami case (AIR 1964 Madras 291) and Dilharshankar case (AIR 1986 SC 1707) besides other cases referred to earlier.

42. Mr.S.V.Jayaraman, learned senior counsel submitted that the Will dated 27.9.1968 (Ex.A-5) by its very nature and language is revocable. He submitted that though the plaint proceeds on the basis that the entire properties comprised in Ex.A-5 Will were the properties of Palaniappa Chettiar and the properties standing in the name of Rangammal were benami, yet, the properties covered in the Will belong both to Palaniappa Chettiar

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and his wife Rangammal and the case of benami was not proved and there is no evidence to show that the properties standing in the name of Rangammal were not self-acquired or separate properties of Rangammal. Learned senior counsel submitted that it is a case of joint Will. He submitted that there is no mutuality and there is enough evidence in the language of the Will to show that the Will is revocable. He submitted that in the Will there is a specific clause permitting both of them or either one of them to revoke the Will. He also submitted that the absolute power of enjoyment of the properties was kept by the survivor and if only any property is left by the survivor, the trust would come into force. Learned senior counsel emphasised that the survivor has been given the full power and absolute enjoyment of the properties on the death of one of the executants and therefore, the intention of the makers of the will is to confer the absolute right on the survivor and in respect of remaining properties after full enjoyment, if any, the trust would come into effect. Learned senior counsel submitted that the wife did not get any benefit under the Will and she being a natural heir under the Hindu law automatically succeeded the estate of her husband on his death. Learned senior counsel submitted that there is no benefit conferred on her by the Will and since she did not get any benefit under the Will, her power of revocation of the Will is absolute. Learned senior counsel submitted that on the true construction of the Will there is an express agreement to revoke or cancel the Will and there is no scope for mutuality. Learned senior counsel submitted that the wife obtained the properties by virtue of her pre-existing rights under Section 14 of the Hindu Succession Act and such rights got enlarged under section 14(1) of the Hindu Succession Act. Learned senior counsel submitted that the survivor became the full owner of the properties and she had every right to deal with the properties and the trial Court was correct in holding that the Will is a joint Will.

43. Mr.V.K.Muthuswami, learned senior counsel appearing for the respondents 6 and 9 supported the arguments of Mr.S.V.Jayaraman, learned senior counsel appearing for the respondents 4 and 5. He also submitted that the Will (Ex.A-5) conferred on the survivor the absolute right of enjoyment and only after the lifetime of the survivor, if any property remains, the trust would come into force. Learned senior counsel submitted that the power to sell any of the properties specified in the Will is expressly mentioned and therefore the survivor Rangammal had the full power of alienation and the respondents 6 and 9 being the alienees derived valid title over the properties purchased by them from Rangammal. He further submitted that the sales in any event have to be upheld as in one case, the sale was in respect of the property belonging to Palaniappa Chettiar and in another case the sale was in respect of the property belonging to Rangammal and on the death of Palaniappa Chettiar, Rangammal became the absolute owner of his properties by succession and she got the full power of alienation over the properties covered in the Will. Learned senior counsel also submitted that the sales in any event should be protected as the respondents are bona fide purchasers for value and they

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also made improvements in the properties and on the basis of equity also the sales in favour of the respondents should be protected.

44. Mr.P.V.Ramachandran, learned counsel reiterated the arguments of Mr.S.V.Jayaraman and Mr.V.K.Muthuswami, learned senior counsel. Mr.Venkatachalapathi, learned senior counsel supported the arguments of Mr.T.R.Mani, learned senior counsel.

45. We have carefully considered the arguments of Mr.T.R.Mani, Mr.S.V.Jayaraman and Mr.V.K.Muthuswami learned senior counsel and also the arguments of other learned counsel. We are of the view that in the matter of construction of a Will, the Court has to see the intention of the testator first. In determining the construction of a Will, the Privy Council in NATHU RAMU v. GANGABAI (AIR 1938 P.C. 228) noticed the decision in Sreemutty Soorjeemoney Dossee v. Denubundoo Mullick (1854-57) 6 MIA 526 =4 WR 114=1 Suther 291=1 Sar 583 (PC) and laid down the law as under:-

> " The Hindu law, no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily the words of the Will are to be considered. They convey the expression of the testator's wishes; but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case those circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded, is the law of the country under which the Will is made and its dispositions are to be carried out. If that law has attached to particular words a particular effect, it must be assumed that the testator, in the dispositions which he has made, had regard to that meaning or to that effect, unless the language of the Will or the surrounding circumstances displace that assumption".

46. In AIYATHURAI v. MUNICIPAL COUNCIL (AIR 1965 Madras 519) this Court laid down the principles on the construction of Will, whether it gives absolute or limited interest and whether the disposition was made in favour of legatee with a right to enjoy the properties throughout her life and thereafter permit her to dedicate to any charity and the following observation is relevant for the purpose of this case:-

> "A limited grant can of course be inferred either from the language employed in the document, or by the nature of the various dispositions. An instance of the former is a case where it is said that the donee will enjoy for her life. In the present case, the

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document says that Bagirathi alone shall enjoy the properties during her lifetime. The word Aayul Muluvathum Anubavithu vandu (enjoy) is of wide import. The word 'enjoy' itself will include within it, power of alienation etc., unless there be other indications in the document to show that a more limited meaning was intended. An example of the latter kind is found where property is given to a person to be enjoyed in apparently wide terms but there are other dispositions of the same property by way of remainder or otherwise. In such a case, difficult questions will arise whether the latter disposition of the property is invalid as being repugnant to the former, or only thus reveal an intention in the donor to restrict the apparently absolute estate conferred on the first taker. The primary rule in such cases is to ascertain the intention of the settlor or testator. Such intention is to be ascertained from a reading of the document as a whole. If it is found that the intention of the testator is to give an absolute estate to the first person, the subsequent dispositions will have to be regarded as void, being repugnant to the estate given to that person. If, on the other hand, it is found that the latter disposition was intended to cut down the first, effect must be given to both the dispositions by importing the grant of a limited estate to the first and the remainder to the subsequent donee."

47. The Supreme Court in ARUNKUMAR & ANR. v. SHRINIWAS & ORS (2003(3) Supreme 422), after referring to the decision in Navneet Lal @ Rangi v. Gokul and Ors (1976(1) SCC 630), laid down the following principles in the interpretation of Wills:-

" (i) The fundamental rule is to ascertain the intention of the testator from the words used, the surrounding circumstances for the purpose of finding out the intended meaning of the words which have been employed;

(ii) The Court, in doing so is entitled to put itself into the armchair of the testator and is bound to bear in mind also other matters than merely the words used and the probability that the testator had/would have used the words in a particular sense, in order to arrive at a right construction of the Will and ascertain the meaning of the language used;

(iii) The true intention of the testator has to be

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gathered not by attaching importance to isolated expressions but by reading the Will as a whole, with all its provisions and ignoring none of them, as redundant or contradictory, giving such construction as would give to every expression some effect rather than that which would render any of the expressions inoperative.

(iv) Where apparently conflicting dispositions can be reconciled by giving full effect to every word used in a document, such a construction should be accepted instead of a construction which would have the effect of cutting down the clear meaning of the words used by the testator;

(v) It is one of the cardinal principles of construction of Wills that to the extent that it is legally possible effect should be given to every disposition contained in the Will, unless the law prevents effect being given to it. If even there appear to be two repugnant provisions conferring successive interests and the first interest created is valid the subsequent interest cannot take effect, the court will proceed to the farthest extent to avoid repugnancy, so that effect could be given as far as possible, to every testamentary intention contained in the Will".

48. We are of the view, the question whether the Will dated 27.9.1968 (Ex.A-5) is a joint Will or a joint and mutual Will has to be considered in the light of the principles laid down by Privy Council and Supreme Court as well as the decisions of this Court. We have carefully gone through the Will dated 27.9.1968. It is in Tamil language. Though a translated copy in English has been furnished, we confess that the English translation does not reflect the true meaning and purport of the Will which one gets by reading the document in the language in which it is written. At the time of execution of the Will, Rangammal was 78 years old and Palaniappa Chettiar was 85 years old and both were in advanced age. A reading of the Will shows that it was executed by mutual consent of both of them and out of their own free will and out of mutual understanding or agreement. In the Will it is stated that they were leading the married life for a quite long period and they had no issues. In the Will it is also stated that there was no possibility of an issue being born to them. It is stated that the circumstances were such that they were not in a position to adopt anyone and because of their advanced age, they may not live for long number of years. The Will expressly stipulates that after the lifetime of both, their relatives should not claim or enjoy any of their properties covered in the Will. The Will also stipulates that no body should approach the Court claiming any right over the properties and

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to avoid any litigation, they were executing the Will.

49. The Will deals with three stages; the first stage is with reference to mode of enjoyment during the joint lifetime of both of them, the second stage is the mode of enjoyment by the survivor after the death of anyone of them and the third stage is the mode of enjoyment by way of charities and religious dispositions after the lifetime of both of them. We have already set out various kinds of dispositions and charities made in the Will. It is relevant to notice here that Palaniappa Chettiar had a charitable disposition of mind which is evident from his earlier Will executed as early as on 15.7.1931. In that Will he has clearly stipulated that in case of any issue being born, 1/4th of the properties should go to charity and if there was no issue, 3/4th of the properties should go to charity. In that Will he has also stated that after his lifetime, the Government should take over the properties and carry out the charitable objects without any deviation and fulfil his wishes so that his 'Jeevan' would get salvage. A reading of the Will of Palaniappa Chettiar dated 15.7.1931 clearly shows his intention to dispose of the properties in favour of charitable objects. He has emphasised that spending on charities would salvage his soul.

50. Subsequently, another Will came to be executed by Palaniappa Chettiar in Ex.B-14 dated 15.7.1956, but the Will has been marked only for the purpose of identifying his signature and not for its contents. However, it is stated by Mr.S.V.Jayaraman, learned senior counsel for the respondents 4 and 5 that Palaniappa Chettiar bequeathed the properties in favour of Rangammal. However, we are not concerned with the Will dated 15.7.1931 or the subsequent Will dated 15.7.1956, but it must be held that the first Will dated 15.7.1931 executed by Palaniappa Chettiar shows his intention to perform charities and his charitable disposition of mind. A reading of the suit Will, Ex.A-5 shows that the dominant intention of both the executants is the performance of charities.

INTENTION:

51. The Will, Ex.A-5 was executed by both the executants in one document. Their intention to give properties to charities is manifest from the reading of the Will in its entirety. Furthermore, in the Will in more than one place, the executants have used the expressions, 'our properties', 'mutually agreed' and 'our lifetime' and they have also specified the list of charities and the persons or the institutions who have to perform the charities. A careful reading of various clauses of the Will shows the intention of the executants to devise the properties in favour of charities. If the intention of the executants was that the other survivor should take the properties absolutely, then they would have easily stated so and nothing prevented them from stating that the survivor should take the properties absolutely without curtailing the power of enjoyment in any manner, with no obligation attached to charities after their lifetime.

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52. In AIYATHURAI v. MUNICIPAL COUNCIL (AIR 1965 Madras 519) this Court was considering a Will, though not a joint Will. This Court while considering the question as to the existence of trust created by the Will, held as under:-

> " Even if it be held that there is no express gift over in favour of any person other than the first donee, there may be cases where from the language of the document, a limited estate can be inferred. For example, if it is to be held that the direction to the wife to devote the properties to charity amounts to a trust in favour of such a charity, or, at any rate, a power of appointment in her to such objects, it can reasonably be argued that what was conferred on the legatee was a limited estate, coupled with a trust or a power of appointment; for existence of such trust or power would show an intention that a limited estate was given to her."

53. As observed by us, the dominant intention of the testators is to give their properties for charities and in the light of the intention of the testators, the Will dated 27.9.1968 has to be construed.

54. As already observed by us, there are three stages of enjoyment, namely, during the lifetime of both, after the death of one of them and after the death of both of them, but however, both the testator and the testatrix expressed in no uncertain terms that the properties should go for charities. The Will clearly stipulates that during the lifetime of both of them, they are entitled to manage the properties and they are also entitled to perform charities according to their wishes and desires. In other words, they were empowered to spend for any unspecified charity. The Will also stipulates that they have full right to perform the charities individually or jointly. A reading of the Will clearly shows their manifest intention that the properties should go or should be utilised for charities. The Will also provides that during their lifetime, both of them or anyone of them and after the lifetime of one, the survivor should perform the charities according to his/her will and after the lifetime of both, certain specified charitable objects mentioned in the Will should be performed. The specified objects of charities also indicate the intention of the testators. The first specified object of charities is the construction of a choultry in the names of both of them at Palani, a famous pilgrimage centre in Tamil Nadu and the choultry is meant for charitable purposes and all Hindus are allowed to enjoy the choultry free of cost. The second specified object is the performance of Naivaithiyam to Lord Murugan at Palani out of a portion of income from their properties. The third specified object is the performance of Annadanam during Thai Poosam festival at Palani, an important festival during the month of January-February of every year and Annadanam has to be done in the names of both of them, out of a portion of income derived from the properties belonging to both of them. The fourth specified object is

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the construction of an educational institution at Gobichettipalayam in the names of both of them and for running the educational institution, a portion of income from their properties should be utilised. The fifth charitable object is the construction of a maternity hospital at Gobichettipalayam in the names of both of them and the construction of the hospital and its maintenance have to be met out of the income from the properties belonging to both of them.

55. A reading of the objects clearly indicates that since both the executants had lost all their hope of getting any issue for them as they were in advanced age at the time of execution of the Will, they created certain religious and charitable objects probably, to salvage their soul. They made provisions for the construction of a choultry at Palani to be utilised by Hindu pilgrims for boarding and lodging who visit Palani, for doing morning Naivaithiyam to Lord Murugan at Palani temple, for providing Annadanam during Thai Poosam festival at Palani which are either religious or charitable objects. The other objects of the trust are the establishment of an educational institution in Gobichettipalayam and the educational institution is directed to be maintained from the income derived from their properties and also the construction of a maternity hospital at Gobichettipalayam from out of income from the properties belonging to both of them. It is clear from the reading of various objects of the trust that the charities have to be performed and established in the names of both of them from and out of the joint income derived from their properties.

56. As observed earlier, they had no issues and there was no scope of begetting an issue, nor was there an idea for adopting anybody and hence, the testators parted with their properties in respect of certain religious and charitable objects. The purpose of establishing an educational institution at Gobichettipalayam and construction of a maternity hospital at Gobichettipalayam is also clear as they had no issues and hence, they must have been of the view that their properties should be utilised for the construction of maternity hospital and for the education of children. Though Palaniappa Chettiar was not a native of Gobichettipalayam as he was a native of a village, few miles away from Gobichettipalayam as seen from the plaint averments and the suit Will, he settled at Gobichettipalayam where the executants prospered and hence, the executants might have thought that their properties should go for the welfare of the people of Gobichettipalayam and accordingly, chose the place Gobichettipalayam for the construction of maternity hospital and educational institution. We are therefore of the view that the dominant intention of both the executants was to perform charities in the names of both of them out of the income derived from their properties belonging to both of them. It is also seen that both the executants pooled their properties at the time of execution of the Will and they directed carrying out the objects of the trust by utilising the income derived from their properties. It is also evident that even at the time of execution of the Will there was prior arrangement by the employment of the expression,

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"ஏகோபித்து" (unanimously) which clearly denotes that both of them mutually agreed to execute the Will and as observed by us earlier, they used the expression, 'our property' in more than one place and in fact in all places where they directed the performance of charities from the income of the properties belonging to both of them.

57. We find that there is clear evidence in the Will of their common intention that their properties should go to the charities and the common intention is a shared intention by the employment of the expression, 'ஏகோபித்து' (unanimously) and the Will makes it clear that they shared the common intention between them and they made it manifest in the Will itself. We are of the view, the intention of the parties has to be ascertained on the basis of the expressions used and also on the basis of their conduct at the time of making the Will and it is not left to be determined in the light of subsequent events. Both the executants have declared themselves in such a way showing their common intention and it is not necessary to look into the subsequent conduct of the parties to infer the intention of the parties. Their intention to spend the income from their properties for charities is evident from the express words in the Will, such as, exclusion of all relatives in the enjoyment of properties belonging to both of them. They have clearly stipulated in the Will that the relatives of both of them should have no right of enjoyment and should have no proprietary right in their properties. They have also stipulated that their properties should be utilised for the charities and the performance of the charities should not be bogged down by any litigation for any reason whatsoever so that the specified charities may begin on the death of both of them. We are of the view, their anxiety to perform charities is evident from the clause that the properties should not be bogged down by any litigation to avoid any delay in the performance of charities. It is not a case where the charity begins and ends at home, but it is a case where there is clear and positive evidence to show that the income from properties should go to the general public at large and the income from their joint properties should be spent for charitable objects. It is in the light of their manifest intention to make the Will, the entire Will has to be read.

ABSOLUTE ENJOYMENT:

58. Mr.S.V.Jayaraman, learned senior counsel for the respondents 4 and 5 and Mr.V.K.Muthuswami, learned senior counsel for the respondents 6 and 9 submitted that after the death of one of the testators, the other is given the right of absolute enjoyment and only out of the remaining property, if any, the charities are to be performed. We are of the view, the expression, 'சர்வ சுதந்திரமாய்' (absolutely) should be read to mean that the surviving testator, namely, Rangammal would have only the life interest to enjoy the rent and income from the combined properties and she was allowed to use and enjoy the properties subject to the fiduciary duty to keep the properties in tact for charities and she would have no unqualified or unrestricted power to enjoy the properties as she pleases to defeat or to the detriment of the gift over to the charities.

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59. In this connection, it is useful to refer to the decision of the Supreme Court in DILHARSHANKAR v. CONTROLLER OF E.D., AHMEDABAD (AIR 1986 SC 1707). In that case, the Supreme Court was construing a joint Will executed by two executants and it is seen from the Will which is extracted in the judgment of the Supreme Court that after the death of one of the testators, the survivor should become the owner of the property and only after the death of survivor, the property should go to the grandchildren. The Supreme Court considered the recital that the survivor should be the owner of the land, building and garage and after considering the latter terms contained in the Will delineating the joint properties into three parts and each of the parts were bequeathed to three grand sons in species, that is, in specific demarcated areas, held that the expression, 'owner' has been used to indicate the limited ownership to the survivor to enjoy the property till the lifetime of the survivor without disposing of the properties and the properties should be kept intact for the enjoyment of the ultimate legatees or the beneficiaries.

60. This Court in KUPPUSWAMI v. PERUMAL (AIR 1964 Madras 291) has held that the surviving testator had only the life interest in the properties bequeathed and he should not revoke the Will. It is also relevant to notice the decision of the Supreme Court in PEAREY LAL v. RAMESHWAR DAS (AIR 1963 SC 1703). In that case there were two different bequests in favour of two different persons which prima facie appear to be inconsistent with each other. In the factual situation, the Supreme Court held that the duty of the Court is to reconcile both the bequests and full meaning should be given to all the words used by the testator. The Supreme Court also held that if it is held that there was an absolute bequest in favour of the wife with a gift over to operate by way of defeasance, that is to say, if the son survived the wife, the absolute interest of the wife would be cut down and the son would take an absolute interest in the same.

61. In ARUNKUMAR & ANR. v. SHRINIWAS & ORS (2003(3) Supreme 422) the Supreme Court has held that it is one of the cardinal principles of construction of Wills that to the extent that it is legally possible effect should be given to every disposition contained in the Will unless the law prevents effect being given to it and if even there appear to be two repugnant provisions conferring successive interests and the first interest created is valid the subsequent interest cannot take effect, the Court will proceed to the farthest extent to avoid repugnancy so that effect could be given as far as possible, to every testamentary intention contained in the Will.

62. A Division Bench of this Court in AYYATHURAI v. MUNICIPAL CONCIL (AIR 1965 Madras 519), which we have already noticed, has held that the primary rule is to ascertain the intention of the testator and the intention should be ascertained by reading the Will as a whole and if it is found that the latter disposition was intended to cut down the first,

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the effect must be given to both the dispositions by importing the grant of a limited estate to the first and the remainder to the subsequent donee.

63. V.Ramaswami,J. (as His Lordship then was) in HAMSAVENI AMMAL v. RAJAGOPAL CHETTIAR (1977 (1) MLJ 207) considered the same expression, '*சர்வ சுதந்திரமாய்*'(absolutely) in a Will and held that though the testator used the expression '*சர்வ சுதந்திரமாய்*' which are words of absolute grant, there was a provision in the same clause to the effect that after her death her male children had to take the properties and the intention was clear that the prior legatee should have only a life interest and the later bequest would cut down the mode of enjoyment of the earlier bequest.

64. It is also profitable to refer to the decision of the High Court of Australia in BIRMINGHAM v. RENFREW (1936) 57 CLR 666) where Dixon,J. analysed the principles on the enforceability of a mutual Will and the following observations of the learned Judge are relevant for the purpose of this case:-

> "I think the legal result was a contract between husband and wife. The contract bound him, I think, during her lifetime not to revoke his Will without notice to her. If she died without altering her Will, then he was bound after her death not to revoke his Will at all. She on her part afforded the consideration for his promise by making her Will. His obligation not to revoke his Will during her life without notice to her is to be implied. For I think the express promise should be understood as meaning that if she died leaving her Will unrevoked then he would not revoke his. But the agreement really assumes that neither party will alter his or her Will without the knowledge of the other. It has long been established that a contract between persons to make corresponding Wills gives rise to equitable obligations when one acts on the faith of such an agreement and dies leaving his Will unrevoked so that the other takes property under its dispositions. It operates to impose upon the survivor an obligation regarded as specifically enforceable. It is true that he cannot be compelled to make and leave unrevoked a testamentary document and if he dies leaving a last Will containing provisions inconsistent with his agreement it is nevertheless valid as a testamentary act. But the doctrines of equity attach the obligation to the property. The effect is, I think, that the survivor becomes a constructive trustee and the terms of the trust are those of the Will which he undertook would be his last Will.
>
> There is a third element which appears to me to be inherent in the nature of such a contract or

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agreement, although I do not think it has been expressly considered. The purpose of an arrangement for corresponding Wills must often be, as in this case, to enable the survivor during his life to deal as absolute owner with the property passing under the Will of the party first dying. That is to say, the object of the transaction is to put the survivor in a position to enjoy for his own benefit the full ownership so that, for instance, he may convert it and expend the proceeds if he choose. But when he dies he is to bequeath what is left in the manner agreed upon. It is only by the special doctrines of equity that such a floating obligation, suspended, so to speak, during the lifetime of the survivor can descend upon the assets at his death and crystallise into a trust. No doubt gifts and settlements, inter vivos, if calculated to defeat the intention of the compact, could not be made by the survivor and his right of disposition, inter vivos, is, therefore, not unqualified. But, substantially, the purpose of the arrangement Will often be to allow full enjoyment for the survivor's own benefit and advantage upon condition that at his death the residue shall pass as arranged.

In In re Oldham Astbury,J., pointed out, in dealing with the question whether an agreement should be inferred, that in Defour v. Pereira the compact was that the survivor should take a life estate only in the combined property. It was, therefore, easy to fix the corpus with a trust as from the death of the survivor. But I do not see any difficulty in modern equity in attaching to the assets a constructive trust which allowed the survivor to enjoy the property subject to a fiduciary duty which, so to speak, crystallised on his death and disabled him only from voluntary dispositions inter vivos.

On the contrary, as I have said, it seems rather to provide a reason for the intervention of equity. The objection that the intended beneficiaries could not enforce a contract is met by the fact that a constructive trust arises from the contract and the fact that testamentary dispositions made upon the faith of it have taken effect. It is the constructive trust and not the contract that they are entitled to enforce."

The above decision was followed by Chancery Division in RE CLEAVER (DECEASED) (1981) 2 All ER 1018) wherein it was held that the survivor may

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spend for himself the subjects under the mutual agreement in which he is given absolute interest, but he cannot make any substantial lifetime or testamentary gift so as to defeat the mutual agreement.

65. We are of the view, the Will Ex.A-5 has to be construed in the light of the intention and surrounding circumstances at the time of execution of the Will. Palaniappa Chettiar had large extent of properties and he had 17 houses and 43.285 acres of land. In so far as Rangammal is concerned, she had four house sites, 12 houses and 53.665 acres of land and in total, there were 29 houses, four house sites and 96.950 acres of land. Both of them were in advanced age and they had no issues and there was no possibility of getting an survivor and after the death of one of them, the other has to maintain himself or herself and also the properties and meet the medical and other expenses they may be incurred by them as they were in advanced stage even at the time of execution of the Will. They were married couple for a quite number of years and they must have intended that if anything happens to anyone of them, they should take care of the survivor and hence, the properties were bequeathed in such a manner that the survivor can enjoy the properties subject to the gift over to the charities. Therefore, the employment of the expression, 'absolute interest' in that context, in our opinion, means that the surviving testator, namely, Rangammal has the right of enjoyment of income and rent from the properties, that is, life interest over the properties. It is clear that the survivor having taken the properties as the other has not revoked the Will, is bound by the arrangement that the properties should go for charities. It is not necessary for us to define precisely the width or extent of the power of the survivor over the properties devolved on the survivor, but the power of enjoyment of the properties is a curtailed one and it is a life estate or right of enjoyment of income from the properties, and the survivor has no power to completely destroy or dispose of or do away with the properties to the detriment of the charitable objects. As Dixon,J. in Birmingham case (1936) 57 CLR 666) observed, gifts and settlements, inter vivos, if calculated to defeat the intention of the compact, could not be made by the survivor and his right of disposition, inter vivos, is, therefore, not an unqualified one. We are of the view, the proposition laid down by Dixon,J. in Birmingham case would apply to the construction of the Will on hand.

66. Following the above decisions, we are therefore of the view that though the survivor was given the power to enjoy the properties *சர்வ சுதந்திரமாய்* (absolutely), it is only to mean that the survivor should enjoy the property as a life estate holder and it is not an absolute or indefeasible grant. It is also clear that having regard to their old age and having expressed that they may not live for a long time, they must have had in their mind that survivor would not do anything drastically to diminish the property substantially if the property is taken by the survivor and the survivor could be trusted in the matter of fulfilling each other's intention. It is also relevant to notice that vast properties have been acquired by them during their life time and it must

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have been in their mind that the survivor would not fritter away the properties and we are therefore of the view that the said expression 'சர்வ சுதந்திரமாய்'(absolute enjoyment) is employed in the Will as a sort of comfort or cushion to the survivor to meet any unforeseen or unexpected contingencies, if any absolute necessity arises but, at the same time, it cannot be stated that the bequest in favour of charities is a mere wish and an absolute interest was granted in favour of the survivor. We therefore hold that the meaning of the expression, சர்வ சுதந்திரமாய் (absolutely) should be cut down or abridged considering the mutual intention between the executants in making the Will and there are indications in the Will itself to curtail the full implication and import of the expression சர்வ சுதந்திரமாய் (absolutely) when it is used with reference to the survivor. Once we hold that the survivor has no absolute right over the properties obtained by the Will, the other expression, மீதியுள்ள சொத்துக்கள் (remaining properties) would mean the properties remaining after the enjoyment of life estate by the survivor. The said expression cannot be construed to mean that the survivor would have the absolute right to alienate or gift away or dispose of the properties in any manner he/she likes and the expression, 'remaining property' in the will would only mean the corpus of the properties remaining after the death of one of them and the income remains unspent after enjoyment by the survivor.

REVOCATION:

67. The other clause that has been relied upon is that the Will gives the power to both of them jointly and separately to revoke the Will. That clause, in our opinion, has operation only during their joint lifetime, and during the lifetime of both of them, both of them or anyone of them had the right to revoke the Will, and after the lifetime of one of them and after the survivor receives the benefit under the Will, it is not open to the survivor to revoke the Will. We are of the view, that the right given to anyone of the executants to revoke the Will should be exercised only during their joint lifetime and it does not mean that after the lifetime of one of them and after the survivor received the benefits under the Will, he/she shall have power or right to revoke the Will.

68. The next clause that is relied upon is that the Will would come into effect only after the lifetime of both of the executants. The said clause should be construed in the manner that during their joint lifetime, both are entitled to enjoy the properties and after the death of one of them, the survivor shall have the right of limited enjoyment of the properties and the floating charge or obligation created in favour of charities under the document would descend on the properties and it does not mean that the executants never intended their properties should not go in favour of the charities. In other words, the bequest in favour of specified charities should take effect on the death of both of them.

69. Learned senior counsel for the respondents 4 and 5 also referred to the expression, 'விற்பனை செய்தால் அதை நீக்கியும்' (minus the property

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sold) found in the schedule to the Will'. We have already hold that the survivor has no power to alienate the properties to the detriment of the charitable objects and the said expression only means that during their joint life time, both will have the right of alienation and any property sold by anyone of them during their joint lifetime, shall be deleted from the list of properties found in the schedule. It does not improve the case of the respondents in any manner.

70. It is now necessary to consider whether there was an agreement between the makers of the Will that they should not revoke the Will. The Supreme Court in Dilharshanar case (AIR 1986 SC 1707) has held that in order to render mutual Will irrevocable, both the conditions must be satisfied, namely, (1) the surviving testator must have received benefits from the deceased under the mutual Will and (2) the mutual Will should have been executed in pursuance of an agreement that the testators should not revoke the mutual Will.

71. Mr.T.R.Mani, learned senior counsel for the second appellant strongly relied upon the decision of this Court in in Kuppuswami case (AIR 1964 Madras 291) and submitted that it is a case of single document executed by both of them and they also used the expressions, 'our property' and 'our Will'. He also submitted that it is not a case of simultaneous Will and therefore they have no power to revoke the Will except by their mutual consent and after the survivor has received the benefits under the Will, it is not open to her to revoke the Will. Learned senior counsel submitted that the dicta laid down by this Court in Kuppuswami case was quoted without disapproval by the Supreme Court in Dilharshankar case (AIR 1986 SC 1707) in paragraph-40 of its judgment and therefore he submitted that there is enough evidence in the document itself to establish the intention of the executants that they have no power to revoke the Will except by mutual consent.

72. We find that the Chancery Division in In re Oldham Hadwen v. Myles (1925) 1 Ch.75) has held that the instrument itself is the evidence of the agreement. We are of the view that the reading of the Will dated 27.9.1968 shows that it was executed on the basis of bilateral agreement entered into between Palaniappa Chettiar and Rangammal and they used the expression, ஏகோபித்து (unanimously) which means that there was an unanimous agreement to make the Will and they had mutually agreed to the terms of the Will. They had mutual and reciprocal consideration in the sense that one being testator and another being legatee of each other and the Will was made on the basis of mutual trust and mutual confidence. They, throughout in the Will, used the expression, 'our property'. It is stated that to carry out the scheme of specified objects of the trust, the income from 'our property' should be used and it is clear that the specified objects of the trust could not be accomplished if the survivor, after taking the benefit does any act unilaterally which would defeat the mutual agreement entered into between the parties at the time of execution of the Will. We are of the view, if such an absolute power of

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revocation is given to the survivor, it would really defeat the mutual agreement for making the Will and it would also render impossible the accomplishment of objects of the trust. There is nothing in the Will to show that the survivor should have the power to cancel the Will after receiving the benefits. On the other hand, there is intrinsic evidence in the Will to show that the Will is irrevocable after the lifetime of one of them as the other has taken benefits under the Will and the power of revocation is taken away after the lifetime of one of them who made the Will as the survivor has received the benefits. The reading of the Will clearly shows that both Palaniappa Chettiar and Rangammal mutually agreed that their properties should be pooled together and enjoyed in a particular manner during their joint lifetime and after the lifetime of one of them, the other has the restrictive power of enjoyment and after the lifetime of both, their properties should go to the specified objects of the trust.

73. It is also relevant to notice the observations of this Court in Kuppuswami case (AIR 1964 Mad 291) by Ramamurti,J. in paragraph-32 of that judgment, which we have referred to in the earlier part of this judgment in para-37, was dissented by the Gujarat High Court in C.E.D. v. DILHARSHANKER C.BHACHECH (102 ITR 56). However, the Supreme Court in DILHARSHANKAR v. CONTROLLER OF E.D., AHMEDABAD (AIR 1986 S.C.1707) reversed the judgment of the Gujarat High Court which implies that the evidence of such an agreement can be found in the Will itself.

74. Learned senior counsel appearing for various respondents submitted that in DILHARSHANKAR v. CONTROLLER OF E.D., AHMEDABAD (AIR 1986 SC 1707) the Supreme Court has held that it was a mutual Will, because the property was intended to be kept in tact for the enjoyment of the ultimate legatees and during the lifetime of either of the testators the property would not in any way be parted with or diminished. Learned senior counsel also referred to paras-49, 51 and 54 of the said judgement. Learned senior counsel submitted that on the facts of the case, Rangammal is given the power of enjoyment and therefore the Will cannot be regarded as a mutual Will. We have already held that the power of enjoyment of properties by Rangammal is a limited one and she has to hold the properties in trust and intact for the specified objects of the trust. We also hold that on proper construction of the Will, she has the right of enjoyment of income from the properties and her right of enjoyment should not be done in such a manner to defeat altogether the objects of the trust and her right of enjoyment is not an unqualified one, but it is a qualified one. It is, in this sense, their properties were intended to be kept in tact for charities.

75. In our view, it is not necessary to go into the question that because it is a single Will jointly made, it should be construed as a mutual Will. The fact that both Palaniappa Chettiar and Rangammal joined together to make disposition in favour of charities is evidenced by their joining together in the execution of the document. They have also agreed

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that the joint disposition should not be revoked by the survivor and further the Will stipulates that only during their joint lifetime, both the testator and the testatrix have the power to modify or revoke the Will. It is clear that if one of them wants to revoke the Will, it must be done during their joint lifetime, but after the lifetime of anyone and after receiving the benefits under the Will, the Will becomes irrevocable. We are of the view that the clause in the Will which has been strongly relied upon by Mr.S.V.Jayaraman, learned senior counsel for the respondents 4 and 5 that one of the testators has the power to revoke the Will should be read to mean that the executants has the power to revoke the Will during their joint life time and it does not mean that the survivor has the power to revoke the Will after the lifetime of other. We are therefore of the view that both the conditions to make the Will a mutual Will are satisfied in the present case.

BENEFIT BY SURVIVOR:

76. The other submission is that the survivor has not received the benefit under the Will as Rangammal is a natural heir of Palaniappa Chettiar and under section 8 of the Hindu Succession Act she would receive the entire properties of Palaniapa Chettiar on his death. We are unable to accept the said submission as it is open to the testator to dispose of his property in any manner during his life time and to alter the course of inheritance by disposing of his property in favour of a third party or charity also. Therefore, if the submission of learned senior counsel for the respondents 4 and 5 is accepted, it would lead to a strange situation that mutual Will can not be executed by a husband and wife or by two close relatives, and there are no such restrictions, and no such restriction in general law has been pointed out to us to establish that the mutual Will is not possible in case of a Will executed by a husband and wife having no issues. We are of the view that the true test is whether the survivor takes the property under the Will and the fact that he or she may be sole heir under the general law to succeed to all the properties is immaterial as the intention of the testator and testatrix in the instant case was that the properties should devolve on her under the Will and hence, it must be held that the properties of Palaniappa Chettiar devolved on Rangammal by the Will.

77. It is also relevant to notice that in the Estate Duty accounts filed by Rangammal, she has specifically stated that the properties devolved on her by the Will. Mr.T.R.Mani, learned senior counsel submitted that Rangammal claimed herself as a legatee before the Estate Duty Officer when she filed accounts of estate duty on the death of Palaniappa Chettiar. He referred to Exs.A-2 to A-4 and according to him, she claimed the properties under the Will and not as a heir. We are of the view that it is a strong piece of evidence to show that Rangammal claimed her right in the properties under the Will and not by way of inheritance. Even otherwise, we are of the view, merely because she happens to be a natural heir, the entire estate of the deceased Palaniappa Chettiar may not devolve on her as it is open to Palaniappa

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Chettiar to devise his properties in such a manner to defeat the possible succession by his wife. The expression, 'benefit' is a fairly wide term and both the testator and the testatrix intended that the survivor should get the benefit under the Will and if both of them desired that the other should derive the benefit under the will, in our view, it is not open to the respondents to contend that she has not derived the benefit under the Will. We are of the view that she has not derived the benefit de hors the Will, more particularly when she herself has stated in the sale deeds in Exs.B-136 & B-137 that she obtained the properties under the Will, though such recital is absent in the other deeds of sale. Though section 14 of the Hindu Succession Act, 1956 has been referred to, that section has no application as we have held that the properties devolved on Rangammal by Will and she was holding the properties for trust subject to enjoyment of rent and income from the properties and user of the properties and the user would not enlarge into an absolute estate as she was bound by the mutual agreement and also in view of the receipt of benefit under the Will.

78. We find that on the whole the Will clearly shows that there was an agreement between the makers of the Will to dispose of their respective properties in a similar way. The terms of the Will and the circumstances also show that there was a prior and enforceable agreement between Palaniappa Chettiar and his wife Rangammal to execute a mutual Will on a mutual constructive trust that the survivor, to whom the properties have devolved under agreement, should deal with the properties in a restricted manner for the benefit of charities. We have already held that there was an unanimous agreement between Palaniappa Chettiar and Rangammal to execute the Will and the Will imposes upon them a mutual obligation to dispose of their properties in a similar way, and Rangammal had the benefits under the Will. We hold that a constructive trust is imposed on the properties covered under the Will for the benefit of the charities. We hold that Rangammal, the survivor, is bound to administer the Will in accordance with the mutual agreement between her and the testator as she cannot act in any way in derogation of the mutual obligation and agreement between both the parties and imposed on themselves mutually. We also hold that the suit Will (Ex.A-5) is a joint and mutual Will.

CREATION OF TRUST:

79. We are unable to accept the submission of Mr.S.V.Jayaraman, learned senior counsel appearing for the respondents 4 and 5, Mr.V.K.Muthuswami, learned senior counsel appearing for the respondents 6 and 9 and Mr.P.V.Ramachandram, learned counsel appearing for some other alienees that no trust has been created. Their submission was that the trust, if any, would operate only with reference to the balance or remaining properties left by Rangammal after full enjoyment and since there is uncertainty with reference to the properties left over by her, the trust is void for uncertainty. Mr.Ramachandran, learned counsel referred to the decision of the Supreme Court in ABDUL KAYUM v. ALIBHAI (AIR 1963 SC 303) and submitted that though the provisions of Trust Act are inapplicable to a public charitable and religious trust, the

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principles of the Trust Act would apply. There can be no quarrel over the proposition submitted by Mr.P.V.Ramachandran, learned counsel. For a valid trust to be created, the essential characteristics are that there must be certainty as regards the objects of the trust, the subject matter of the trust and the persons intended to be benefited under the trust and there must be a binding and legal obligation on the trustee to deal with the properties in a particular way.

80. Considering the Will, Ex.A-5 in the light of the above tests for the creation of a valid trust, we are of the view that there is a legal and binding obligation on the trustees to deal with the properties in a particular manner and the persons intended to be benefited under the trust are general public and it is not a private trust. We have already held that the right of enjoyment of Rangammal during her lifetime and after the lifetime of her husband Palaniappa Chettiar is a restricted one and she did not possess the right of full enjoyment and full power of alienation to the detriment of the trust. We hold that since the power of enjoyment is a restricted one, the properties that devolved on her, along with other properties remaining unspent on the death of Rangammal, would form the corpus of the trust and the trustees were directed to spend the income from the properties for the specified objects mentioned in the Will. We hold that the trust does not fail for want of certainty regarding the objects. It does not suffer for want of certainty regarding the beneficiaries. It equally does not suffer for want of certainty regarding the properties dedicated to the trust. It is also relevant to notice here that at the end of the Will there is a schedule containing itemised properties and the Will operates with reference to those properties. We hold that the essential conditions to make it a valid trust are satisfied fully and the valid trust which was effective even during the lifetime of Rangammal has descended on the properties on her death and a valid trust had come into force.

ALIENATION:

81. In so far as alienation of the properties is concerned, we find that in respect of following properties alienations were made by Palaniappa Chettiar, Rangammal or the defendants 4 and 5:

Date	Description of property	By whom	In favour of	Exhibit No.
23.6.1967	I Sch. Item No.3	Palaniappa Chettiar	Wife of 6th defendant	
19.9.1972 &30.9.1972	II Sch.Items.5 & 6	Rangammal	Defendants 4 and 5	B28 & B29
24.3.1977	I Sch. Item-6	Rangammal	7th defendant	B116
4/2/81	Sch.I, item-12	Defts.4& 5	8th defendant	A37
25.4.1977	Sch.I, Item-13	Rangammal	9th defendant	B121
20.2.1970	Sch.II, item-2 & 7	Rangammal	10th defendant	B114
19.3.1976	Sch.II, item-12	Rangammal	11th defendant	B113

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19.12.1974	Sch.II, item-14	Rangammal	12th defendant	B112
11/5/79	Sch.II, item-15 & 16	Rangammal	13th defendant	B136 & B137
11/3/85	--	Defendants 4 & 5	17th defendant	Ex.A-25

82. In so far as the property sold by Palaniappa Chettiar is concerned, he sold the property in favour of wife of the sixth defendant on 23.6.1967 even before the execution of the suit Will and the sixth defendant was rightly exonerated from the suit. In so far as other alienations are concerned, the submission of Mr.T.R.Mani, learned senior counsel is that the purchasers have not filed any appeal and hence, it is not open to them to canvass the finding of the trial Court regarding alienations. We are unable to accept the said submission as the suit filed by the plaintiffs has been dismissed. The trial Court in para-95 of its judgment has upheld the alienations on the ground that Rangammal had full power of alienation. In other words, the finding in the judgment and the decree are in favour of alienees and hence, it is not necessary for them to prefer any appeal or cross-appeal. Since the finding of the trial Court is in favour of the alienees, it is open to them to support the finding as well as the decree of the trial Court without filing an appeal or cross appeal or cross objection.

83. The next question that arises is whether the alienations are valid. Mr.S.V.Jayaraman and Mr.V.K.Muthuswami learned senior counsel and Mr.P.V.Ramachandran, learned counsel appearing for the respondents submitted that the alienees are bona fide purchasers for value. Mr.V.K.Muthuswami, learned senior counsel referred to the written statement of the 7th defendant, particularly para-10 wherein he has stated that he is a bona fide purchaser and he spent a huge amount to improve the property. Learned senior counsel referred to the written statement of 10th defendant wherein he has stated that he is a bona fide purchaser for value and incurred expenditure to put up an additional construction on the property purchased. He has also referred to the evidence given by the defendants 7 and 10. However, we find that the evidence given by them is a mere repetition of the averments made in the written statements and no fresh evidence has been let in to substantiate the statements made in the written statements. Further, we find that there is no plea of necessity for Rangammal to sell the properties. There is also no proof as to the value of the properties at the time of purchase to claim that the properties were purchased for value. The purchasers have also not produced any evidence to substantiate their contention that they had incurred expenditure to improve the properties. It is also in evidence that relevant account books, though available with them, were not produced. We hold that Rangammal has no power of alienation of the suit properties, after receiving the benefit under the suit will (Ex.A-5).

84. As far as other defendants are concerned, 11th defendant has not

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examined himself and the defendants 9 and 12 have been examined and their cases also stand on the same footing as they have not established the necessity for Rangammal to sell the properties, nor they established that they are bona fide purchasers for value and all the alienees admitted their knowledge about the existence of Ex.A-5 Will and they have not established the bona fide nature of the sales in their favour. We have already held that Rangammal had no power to sell the properties and in the absence of any proof of necessity on her part to sell the properties, we hold that the sales in favour of alienees are null and void.

85. As far as the sale in favour of 17th defendant is concerned, he has purchased the property from the defendants 4 and 5 on 11.3.1985 after the institution of suit and after the order of injunction was passed. Hence, the sale in favour of 17th defendant in any event is invalid and is void.

A.S.No.606 of 1989:

VALIDITY OF WILL,Ex.B-109:

86. Now, we take up the other appeal, A.S.No.606 of 1989 preferred by the defendants 4 and 5 and in this appeal, the plaintiffs and the defendants 1 to 3 and 16 are the parties and other defendants are not parties. There is not much dispute regarding the maintainability of the appeal by the defendants 4 and 5 as the finding of the trial Court regarding the genuineness of the Will of Rangammal in Ex. B-109 has been rendered against the defendants 4 and 5 and hence, the defendants 4 and 5 have preferred the appeal. For the sake of convenience, we refer to the parties as arrayed in the suit, O.S.76 of 1981.

87. In this appeal, we are concerned with the question of truth and genuineness of the Will dated 27.11.1980 (Ex.B-109) executed by Rangammal. At the outset, it must be held that the Will dated 27.11.1980 is not valid in view of our judgment in A.S.No.851 of 1989 of even date wherein we have held that the Will dated 27.9.1968 Ex.A-5 executed by Palaniappa Chettiar and Rangammal is a joint and mutual Will and Rangammal had no power to revoke the Will after receiving benefits under the Will,Ex.A-5. However, for the sake of completeness, we are going into the merits of the case on the question of genuineness of the Will, Ex.B-109.

88. Under the Will (Ex.B-109) all the properties of Rangammal including the properties of Palaniappa Chettiar devolved on her have been bequeathed in favour of defendants 4 and 5 absolutely. The Will has been questioned by the plaintiffs in para-13 of the plaint and it has been stated that the Will purported to have been executed by Rangammal dated 27.11.1980 is not a true and valid will and has no binding effect on trust properties. It is also stated that Rangammal has not executed the Will in sound disposing state of mind and the same was brought about by the defendants 4 and 5 by fraud, undue influence and coercion. It is further stated that the plaintiffs reserve their right to file rejoinder statement after perusal of the original Will to be produced by the defendants 4 and

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5. However, as stated by Mr.S.V.Jayaraman, learned senior counsel, it is seen that no rejoinder or reply statement was filed by the plaintiffs. The trial Court framed an issue regarding the genuineness of the Will in issue No.13 and considered the matter in great detail in paras-84 to 94 of its judgment holding that it is not a genuine will and it was not executed by Rangammal in sound disposing statement of mind. The finding of the trial Court is the subject matter of challenge in this appeal.

89. We heard Mr.S.V.Jayaraman, learned senior counsel appearing for the defendants 4 and 5. He submitted that there are no suspicious circumstances surrounding the execution and attestation of the Will. He also referred to the earlier Will of Palaniappa Chettiar and Rangammal (Ex.A-5) and submitted that the makers of the Will have clearly indicated that none of their relatives should succeed to the properties under any circumstance. He also submitted that there was no love lost between the testators and their relatives and hence, they excluded all their relatives. Learned senior counsel submitted that the defendants 4 and 5 were looking after Rangammal in her advanced age and there is nothing suspicion or unnatural for Rangammal in bequeathing the properties in favour of the defendants 4 and 5. He submitted that due execution and attestation of the Will was proved by examination of the attestors of the Will and the Will was registered and the Registering Officer was also examined. He also submitted that soon after the registration, a complaint was made to the Sub Registrar by one M.Balasubramaniam of Gobichettipalayam not to register the Will on the ground that the Will was a forged one and the said complaint was enquired into by the Registrar of Gobichettipalayam who was examined on behalf of the plaintiffs as P.W.4 who conducted the enquiry on the basis of directions of the Inspector General of Registration. He submitted that the allegation that the Will is a forged one was found to be false. He submitted that besides the attestors, the scribe was examined and the identifying witness before the Register was also examined and the Registrar was examined and there is nothing to discredit their evidence. He also submitted that the minor discrepancies in the evidence would not vitiate the registered Will, duly endorsed by the Registrar.

90. Mr.S.V.Jayaraman, learned senior counsel referred to the evidence of P.W.1 in page 115 of the typed-set of papers wherein he has stated that Rangammal would act according to her will. He also referred to the evidence of D.W.2, one of the attestors of the Will wherein he has stated that Rangammal would act according to her own will and she is not amenable to any influence. He also referred to the evidence of the scribe D.W.3, one of the attesting witness, the doctor D.W.4 and the identifying witness before the Registrar and also the evidence of the Registrar who registered the Will, and submitted that enquiry was conducted soon after the execution of the Will at the earliest point of time and the matter was investigated by P.W.4 and the department did not find anything wrong in the registration of the Will. He also submitted that the enquiry report cannot be set aside or ignored. He submitted that there is no suggestion

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as to the ill-health of Rangammal and it is not the case of the plaintiffs that Rangammal was unconscious at the time of execution of the will. He submitted that the physical and mental condition of the executant was proved and there was no suggestion that the doctor who was examined as D.W.4 never treated Rangammal. He submitted that there is no evidence or material to disbelieve the statement of the Deputy Registrar of Assurance. He submitted that all the statutory requirements have been complied with and nothing has been brought out to deny the execution of the Will, Ex.B-109. He submitted that the doctor, D.W.4 is an independent witness and he was treating Rangammal from 1970 onwards and according to learned senior counsel, all the witnesses speak in unison manner. He also submitted that the witnesses have been examined after a period of about eight years and the minor discrepancy in their evidence, if any, is not material. He submitted that there is nothing to show that the defendants 4 and 5 have played an active part in the execution of the Will. He also submitted that when Rangammal herself has stated in the Will that her hands were shaky and due to the same, she was unable to sign and hence, affixed her thumb impression, her statement must be given due weight, particularly when there are other witnesses to support the statement of Rangammal made in the Will. Learned senior counsel submitted that the defendants 4 and 5 have proved the execution of the Will and proved the attestation of the Will and there is nothing unnatural, nor there is any suspicious circumstance surrounding the execution of the Will as Rangammal has clearly stated that none of the relatives should claim any right over the properties and since the defendants 4 and 5 were taking care and looking after the welfare of Rangammal, there was nothing wrong or unnatural on her part in bequeathing the properties in favour of the defendants 4 and 5. Learned senior counsel also referred to the evidence of D.Ws.1 and 2 to show the physical and mental condition of the executant Rangammal. He submitted that the execution of the Will was spoken to by the attestors of the Will. He referred to the evidence of D.W.2 to show the execution and attestation of the Will. He also referred to the evidence of D.Ws.2, 4, 5 and 6 and submitted that the execution of the Will has been proved. Learned senior counsel also referred to the evidence of P.W.4, the Registrar of Gobichettipalayam who conducted the enquiry on the petition by one M.Balasubramaniam. Learned senior counsel referred to the decisions of the Supreme Court in P.S.SAIRAM V. P.S.RAMA RAO PISEY (AIR 2004 SC 1619) and SRIDEVI v. JAYARAJA SHETTY (2005) 2 SCC 784) and the decisions of this Court in SAROJA v. CHENNIMALAI (2003(4) CTC 330) and DR.SHANTHA v. SHARADA (2003(4) CTC 470).

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91. Mr.T.R.Mani, learned senior counsel appearing for the second plaintiff, on the other hand, submitted that the Will was executed on 27.11.1980 and it was registered on 18.12.1980 and the executant Rangammal died on 24.12.1980 and there are suspicious circumstances surrounding the execution of the Will and Rangammal bequeathed vast extent of properties not only belonging to her, but also obtained by her from her deceased husband in favour of fourth and fifth defendants, who belong to different caste and the fourth defendant was a Bill Collector in Gobichettipalayam

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and his wife, 5th defendant was doing menial work of washing the clothes of Rangammal. He also submitted that obtaining thumb impression in the Will on the date of execution of the Will raises suspicion. He referred to the evidence of doctor (D.W.4) who was one of the attestors of the Will wherein he has stated that Rangammal did not suffer from paralysis. He also referred to the evidence of D.W.3 and pointed out relevant portions to show that the deceased has not dictated the Will. He submitted that there is no explanation as to why Rangammal put her thumb impression and there is also no explanation for the time lag between the date of execution and the date of registration. He referred to the pleadings as well as the recitals in the Will and the evidence of witnesses and submitted that when the doctor has stated that Rangammal was suffering from rheumatism and not paralysis, she should have been capable of signing the will and there is no explanation as to why her signature was not obtained. He submitted that the evidence of the witnesses is contrary to the pleadings. He referred to the evidence of doctor, D.W.4 wherein he has stated that Rangammal had the full capacity to sign which is contrary to the averment made in the written statement as well as in the Will. He submitted that there is no explanation for bequeathing the properties in favour of defendants 4 and 5 belonging to different caste as legatees and there is also no explanation for the cancellation of the earlier Will, Ex.A-5. He submitted that when the Will recites that Rangammal could not move about, the evidence let in on the side of the defendants show that she was in a position to move about and the heavy burden cast on the defendants 4 and 5 to remove suspicious circumstances has not been discharged. He referred to the evidence of fourth defendant (D.W.1), particularly in pages 156 and 157 and also the written statement filed by Rangammal in O.S.No.590 of 1979 on the file of Sub Court, Erode as well as additional statement filed by one Perumal in O.S.No.385 of 1980 on the file of Sub Court, Gobi. He also referred to the evidence of the scribe, D.W.3 wherein he has stated that Rangammal has not dictated the Will. He submitted that there is no pleading that because of shaky hands, Rangammal did not sign and according to him, the evidence on the side of defendants is not supporting the case of the defendants. He submitted that when it is stated that Rangammal could not sign 4 or 5 pages in the Will, there is no explanation for obtaining her thumb impression at the time of registration on 18.12.1980 where one signature of Rangammal was required for registration. He also submitted that the scribe of the Will has stated that the eye sight of Rangammal was normal, the Will recites that her eye sight was failing and no list of properties has been appended to the Will, but whereas in the Will executed by Palaniappa Chettiar and Rangammal, the list of properties was given.

92. Mr.T.R.Mani, learned senior counsel referred to the documentary evidence Exs.A-18 and A-22. Ex.A-18 is dated 1.12.1980 and Ex.A-22 is dated 4.12.1980 and in both the documents Rangammal signed. He submitted that when Rangammal could sign on 1.12.1980 and on 4.12.1980, there is no explanation for her not signing the Will dated 27.11.1980 which was just four days prior to Ex.A-18. He also submitted that when

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Ex.A-5 Will was presented for registration, Rangammal and her husband took exception to put thumb impression and insisted that they must sign (Ex.A-16). He also referred to the evidence of D.W.6 wherein he has stated that he went to Rangammal's house to register Ex.B-109 Will, but he is not able to remember the particulars as to the registration of other documents. He also referred to relevant portions of his evidence and submitted that his evidence is not believable. He referred to the depositions of the witnesses that Rangammal had good eye sight and submitted that the recital made in the Will that Rangammal's eye sight was failing is contrary to the evidence. He also referred to other relevant portions of evidence and submitted that the fifth defendant did not enter into the witness box and the fourth defendant has not discharged the heavy burden cast on him to remove the suspicious circumstances surrounding the execution of the Will. He therefore submitted that the reasonings of the trial Court and the conclusion arrived at by it are sustainable. He also referred to the character of the witnesses as well as the character of the fourth defendant who is living with another woman in the same house along with his wife. Learned senior counsel submitted that the defendants 4 and 5 have not discharged the burden cast on them that it is the last Will of Rangammal and they have also not proved that it is a genuine and true Will of Rangammal. Learned senior counsel referred to the decision of the Supreme Court in H.VENKATACHALA v. B.N. THIMMAJAMMA (AIR 1959 SC 443).

93. The point that arises for consideration is whether the Will of Rangammal deed 27.11.1980 (Ex.B-109) is a true and genuine Will and whether the defendants 4 and 5 have discharged their onus cast on them to remove the suspicious circumstances, if any, surrounding the will and established that it is the last Will of Rangammal.

94. We heard learned senior counsel for the defendants 4 and 5 and learned senior counsel for the second plaintiff. We have gone through the judgment of the trial Court and also the relevant evidence. Before analysing the evidence and deciding the question whether the Will of Rangammal is a true and genuine Will and it is duly proved, it is necessary to refer to the decision of the Supreme Court in H.VENKATACHALA v. B.N.THIMMAJAMMA (AIR 1959 SC 443) wherein the Supreme Court held that if there are suspicious circumstances surrounding the execution of the Will like the shaky signature and doubtful evidence in support of the propounder's case, the condition of the testator's mind at the time of execution of the Will, the disposition made in the Will being unnatural, improbable or unfair in the light of relevant circumstances, the Court should expect that all legitimate suspicions should be completely removed before the document is accepted as the last Will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy and unless it is satisfactorily discharged, Courts would be reluctant to treat the document as the last Will of the testator and it was also held that if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the Will propounded, such pleas may have to be proved by the caveators; but, even

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without such pleas, circumstances may raise a doubt as to whether the testator was acting on his own free will in executing the Will and in such circumstances, it would be a part of the initial onus on the propounder to remove any such legitimate doubts in the matter. The Supreme Court also held that for deciding material questions of fact which arise in applications for probate or in actions on Wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence.

95. The above view was reiterated by the Supreme Court in RANI PURNIMA DEBI AND ANOTHER v. KUMAR NARAYAN DEB AND ANOTHER (AIR 1962 SC 567) and recently, in SRIDEVI v. JAYARAJA SHETTY (2005) 2 SCC 784) wherein the Supreme Court held as under:-

> "It is well settled proposition of law that mode of proving the Will does not differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a Will by section 63 of the Indian Succession Act, 1925. The onus to prove the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and proof of the signature of the testator, as required by law, need be sufficient to discharge the onus. Where there are suspicious circumstances, the onus would again be on the propounder to explain them to the satisfaction of the court before the Will can be accepted as genuine. Proof in either case cannot be mathematically precise and certain and should be one of satisfaction of a prudent mind in such matters. In case the person contesting the Will alleges under influence, fraud or coercion, the onus will be on him to prove the same. As to what are suspicious circumstances has to be judged in the facts and circumstances of each particular case .(For this see, H.Venkatachala Iyengar v. B.N.Thimmajamma, 1959 Supp (1) SCR 426: AIR 1959 SC 443) and the subsequent judgments Ramachandra Rambux v. Champabai (1964) 6 SCR 814: AIR 1965 SC 354), Surendra Pal v. Dr.Saraswati Arora (1974) 2 SCC 600) Jawant Kaur v. Amrit Kaur (1977)1 SCC 369) and Meenakshiammal v. Chandrasekaran (2005) 1 SCC 280)."

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96. The Supreme Court in SUSHILA DEVI v. KRISHNA KUMAR (AIR 1972 SC 2236) has held that in the absence of suspicious circumstances surrounding the execution of the Will, the proof of testamentary capacity and the signature of the testator as required by the law may be sufficient to discharge the onus. It is also equally well established by the Supreme Court in P.S.SAIRAM v. P.S.RAMA RAO PISEY (AIR 2004 SC 1619) that when it is stated that the hands of the testator were shaking and the testator was unable to put his signature in the Will, the statement must be given

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due weight. The Supreme Court in the above case held as under:-

> "It is true that Sadasiva Rao was a literate person, but he put his LTM on the Will reason therefor finds mention in the Will, Ext.D.13 itself wherein it was specifically mentioned that as hands of Sadasiva Rao were shaking due to nervous weakness, he was putting his LTM on the Will. Even on the Vakalatnama (Ext.P.28) defendant No.1 put his LTM, but did not sign it. D.W.3 stated in his evidence that as Sadasiva Rao was diabetic patient and his hands were shivering, he did not sign the Will but put his LTM thereon. The testator, who died during the pendency of the suit, as stated above, was examined as DW1 and in his evidence he had stated that because of nervous disability he was not in a position to put his signature on the Will."

97. A Bench of this Court, in which one of us was a party, in SAROJA v. CHENNIMALAI (2003(4) CTC 330) held that when the testator himself has stated that his hands were shaking and he was not in a position to sign, that statement should be given weight, particularly when the Sub Registrar of assurance has stated that the testator has affixed his thumb impression at the time when the document was presented for registration in his presence.

98. Mr.S.V.Jayaraman, learned senior counsel referred to the decision of this Court in Dr.SHANTHA v. SHARADA (2003 (4) CTC 470) and relied upon the following proposition laid down by this Court at page 476:

> " When a Will has once been made and is apparently in perfect form, and the evidence of the attesting witness is to be trusted, few things can be more dangerous than to attempt to recreate the kind of Will that the man ought, in the pinion of the Court, to have made and once the man's mind is free and clear and is capable of disposing of his property, the way in which it is to be disposed of rests, with him, and it is not for any court to try and discover whether a Will could not have been made more consonant either with reason or with justice."

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99. It is true that the mode of proving the Will does not ordinarily differ from that of proving any other document, subject to the satisfaction of the special requirement of attestation prescribed in the case of a Will by section 63 of the Indian Succession Act and section 68 of the Evidence Act and if there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court and in the absence of suspicious circumstances surrounding the execution of the Will, the proof of testamentary capacity and the signature of the testator would be sufficient to discharge the onus. The Supreme Court in

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H.Venkatachala Iyengar case (AIR 1959 SC 443) has held that where there are suspicious circumstances surrounding the execution of the Will, the onus is on the propounder to explain them to the satisfaction of the Court before the Will could be accepted as genuine. The suspicious circumstances would depend upon the facts and circumstances of each case. As observed by the Supreme Court, the shaky signature, feeble mind and unfair and unjust disposal of property or the propounder himself taking a leading part in making of the Will under which he receives substantial benefits are examples of some of the suspicious features and the burden is on the propounder to remove all the legitimate suspicion to the satisfaction of the Court to accept the Will as the last Will of the testator. Though in the plaint it has been stated that the plaintiffs reserved the right to file a reply statement after going through the document, Ex.B-109, they have not done so. The plaintiffs have stated that the Will said to have been executed by Rangammal on 27.11.1980 (Ex.B-109) is not a true and genuine Will and it has no binding effect on the properties.

100. In the instant case, though the plaintiffs have not filed any reply statement for which they reserved their right, we hold that under the provisions of the Code of Civil Procedure, there is no need to file any reply statement and the burden is on the propounder to dispel all the suspicious circumstances surrounding the execution of the Will to the satisfaction of the Court before the Will could be accepted as a genuine and last Will of the testatrix. It is no doubt true that so far as the plea of coercion, fraud and undue influence is concerned, it is the duty of the plaintiffs to discharge the same, but the said burden will be shifted to the plaintiffs after the initial burden cast on the propounder of the Will is discharged removing the suspicious circumstances surrounding the Will. Even otherwise, we find that the 16th defendant in its written statement has stated that Rangammal was not in sound disposing state of mind and she was not aware of the execution of the Will and hence, when there is denial of the execution of the Will by the 16th defendant, the defendants 4 and 5 have to prove the Will. Now, we consider the evidence that has been let in on the question of execution and attestation of the Will, Ex.B-109.

101. It is in evidence of P.W.1 that Rangammal, the testatrix would act according to her own will. D.W.2 in his evidence has stated that the testatrix was not amenable to any pressure. D.W.3 the scribe in his evidence has stated that the Will was executed by Rangammal and the Will was also attested by the attestors. One of the attestors, Dr.Lakshmanan (D.W.4) has stated that he saw the testatrix putting her thumb impression and he signed as attestor and Rangammal saw the attestation not only by D.W.4 but also by other attesting witness. He has deposed that he was the family doctor of Rangammal and he was giving treatment to her and he started treating her from the year 1970. The identifying witness for registration of the will was examined as D.W.5 and he has stated that he identified Rangammal before the Sub Registrar along with one Palanisami.

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He has stated that the Will was executed by Rangammal. The Sub Registrar who registered the Will was examined as D.W.6. He has spoken about the mental condition of Rangammal. He has also stated that at the time of presentation of the Will for registration, Rangammal affixed her thumb impression and the Will was registered. He also also deposed that the eye sight of Rangammal was normal.

102. As far as the execution of the Will is concerned, D.W.2 attestor has spoken about the factum of attestation. He has stated that Rangammal affixed her thumb impression in Ex.B-109 Will. In his cross examination, he has also stated that D.W.3 wrote the draft of the Will. The scribe of the Will was examined as D.W.3. He has stated that he wrote the Will. He has also referred to the presence of the attesting witness D.W.2 along with one Kolanthai Gounder. He also referred to the presence of D.W.4 and D.W.5. He has stated that he read over the draft of the Will to the testatrix. He has also stated that after the Will in original was written, Rangammal affixed her thumb impression in each page of the document. He has stated that the attesting witnesses signed the will in the presence of Rangammal and he signed the Will as the scribe. He has also affirmed that Sub Registrar came to the house of Rangammal at 5.10 p.m. and he has also referred to the mode of registration of the Will, Ex.B-109. He has stated that nobody compelled Rangammal to execute the Will or register the Will. He has stated that her eye sight was clear. He has stated that the draft was read by Rangammal carefully and after Ex.B-109 was written, Rangammal tore off the draft. The attestor, Dr.C.N.Lakshmanan was examined as D.W.4. He has affirmed the execution and attestation of the Will. D.W.4 has also spoken to the registration of the Will. One Palanivel, examined as D.W.5, was identifying the testatrix for registration of the Will. He has spoken about the registration of the Will. D.W.6 who registered the Will, in his evidence, has supported the registration of the Will.

103. As far as the suspicious circumstances surrounding the Will are concerned, it is relevant to notice the averments made by the fourth defendant in the written statement. In para-12 of the written statement, the defendants 4 and 5 have stated that Rangammal had been taking treatment for paralytic attack for some years under Dr.Lakshmanan of Gobichettipalayam (D.W.4) who was her family physician and Rangammal was mentally alert till her death. It is also stated that the Will was written to her dictation in the presence of the attestors and it was read over to her and she admitted the recitals to be true and correct and affixed her thumb impression in the presence of attestors and the attestors attested the document in the presence of the testatrix. It is also stated that though she was having paralytic attack on her limbs, her mind was not affected and Rangammal gave a sworn statement before the sub Registrar admitting the execution of the Will, which was not produced and marked as an exhibit, paid the registration charges and affixed her thumb impression in the presence of identifying witnesses and the Sub Registrar and the Will was registered.

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104. The Will (Ex.B-109) executed by Rangammal is dated 27.11.1980 and it was registered on 18.12.1980 and the testatrix died on 24.12.1980. There is no explanation given as to why the document written on 27.11.1980 was registered on 18.12.1980 either in the written statement or in the evidence and the time lag is not explained by the propounder of the Will.

105. Now, we examine the recitals of the Will, Ex. B-109. In the Will it is stated that Rangammal was suffering from 'வாதநோய்' which, if translated, means paralysis or rheumatism. In the Will there is a recital that her eye sight was weak and her hands were shaky and since she was not able to sign, she put her left thumb impression. One of the attestors, Dr.Lakshmanan was examined as D.W.4 and he has stated that Rangammal was suffering from rheumatism and not paralysis and he was giving treatment to her for rheumatism. He has also stated in his evidence that Rangammal did not have any paralytic attack. He has stated that the Will was prepared in the year 1980 in the house of Rangammal. He has also stated that she was able to move about in the house itself, but in the Will it is stated that Rangammal was bedridden due to paralytic attack. D.W.4 in his evidence has stated that the recital in Ex.B-109 that Rangammal was bedridden is not correct. According to him, the expression in Ex.B-109 that she was not able to sign would mean that she had pain. He has also admitted that he did not know that except him, any other doctor was giving treatment to Rangammal and he was the family doctor of Rangammal and for receiving fees, he did not issue any receipt and he has not maintained any record for giving treatment to Rangammal. Curiously, in the re-examination, D.W.4 has stated that Rangammal told that since she had shivering in her hands, she affixed thumb impression. D.W.4 has also stated that at the time of execution of the Will, Rangammal was in a position to sign and he did not know that there is a statement in the Will that she was not in a position to sign. D.W.4 has also stated that the house in which Rangammal was living looked like a palace and there were no servants in the house. D.W.4 has denied the suggestion that Rangammal had filed a statement before the Court to the effect that she was mentally affected and he denied that he was falsely deposing that Rangammal was mentally normal. He has also stated that he did not know whether the defendants 4 and 5 were looking after Rangammal and he did not know whether Rangammal had number of relatives. However, in the written statement filed by Rangammal in O.S.No.590 of 1979 on the file of Sub Court, Erode it is stated that Rangammal was 80 years old and she was helpless and she had no issues or close relations and she was an illiterate villager and she had nobody to assist her and to advise her and she had been suffering from paralysis for the last 10 years and her movement from the house was very much restricted and she had been under the treatment of Dr.Lakshmanan (D.W.4). It is also stated that the mental and physical capacity temporarily at times, semi-permanently at times was affected by age, illness and mental and bodily distress. It is also stated that her signature was obtained in blank papers and also in some

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papers where something was written and she put her signatures without knowing the contents. But, the statement made by Rangammal in the Will is that she was unable to sign and hence, she put her thumb impression. Further, it is seen that the written statement filed by Rangammal in O.S.No.590 of 1979 on the file of Sub Court, Erode was adopted by the fourth defendant herein who was the second defendant in that suit. In that written statement it is stated that Rangammal was suffering from paralysis for 10 years and D.W.4 was giving her treatment. But, D.W.4 in his evidence has stated that the physical and mental condition of Rangammal was normal and she was affected by rheumatism and not by paralysis. He has also denied that he was giving false evidence before the Court.

106. Now, let us consider the evidence of D.W.1, the fourth defendant. The fifth defendant is also a beneficiary under the Will and she has not examined herself. The fourth defendant in his evidence has stated that Rangammal was religiously devoted person and she had faith in God. He has stated in his cross-examination that the eye sight of Rangammal was normal and there was no difficulty for her to sign and she was affected by rheumatism and due to rheumatic pain, she could not sign but, in his written statement he has stated that she was suffering from paralytic attack. Though in his evidence D.W.1 has admitted that at the time of execution of the Will he was not in the house, but he admitted that his wife was present there however, the fifth defendant was not examined. He has also admitted that Rangammal was 88 years old at the time of her death. It is in evidence that apart from his wife, he kept one Sarasa. He has denied that one Marayee was his concubine but, the voters list shows that she was living with D.W.1. He has also stated that Rangammal was not bedridden at the time of execution of Ex.B-109 which is contrary to the recital contained in Ex.B-109. He has also stated that her hands were not shaky and his wife was washing the clothes of Rangammal. He has also stated that himself and his wife were not protecting Rangammal. He has also stated that Rangammal was affected by rheumatic pain about 2 or 3 days before her death. He has stated that he was not aware of the statement made by Rangammal in Ex.A-30 that her physical and mental capacity was affected by illness, though he filed a written statement in that suit adopting the statement of Rangammal. He has also stated that one of the attestors is his brother-in-law who married his sister. He denied the contents of the affidavit of his brother-in-law Rajagopal wherein it is stated that Ex.B-109 Will was written in the residence of Palaniappa Pandaram and then, it was taken by D.W.4 and Marayee and D.W.4 and Marayee gave pills to Rangammal and thereafter the thumb impression of Rangammal was obtained. D.W.4 has also stated that only two days after the registration, he came to know about Ex.B-109 and he did not know the reason as to why there was delay in registering the document.

107. As far as the scribe D.W.3 is concerned, his evidence is also full of contradictions. When the written statement of the defendants 4 and 5 states that the Will was dictated by the testatrix, it is his evidence that he wrote the draft of the Will and read over the same to

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Rangammal who accepted the same to be correct. It is also relevant to notice that there is no pleading that Rangammal could not sign as there were 5 or 6 pages to sign whereas in his evidence D.W.3 has stated that since the document contained 5 or 6 pages, she put her thumb impression because of her shaky hands. As rightly pointed out by Mr.T.R.Mani, learned senior counsel, if Rangammal was able to sign one or two signatures, nothing prevented her from signing the document at the time of registration of the document which required only one signature. It is also relevant to notice that the scribe (D.W.3) has admitted that Rangammal had a normal eye sight which is contrary to the recital in the Will that she had a failing eye sight. He has stated that he is not aware whether the hands of Rangammal were shaky; which of her hands, whether right or left hand was shaky. He has also stated that he had no personal knowledge that her hands were shaky, and since Rangammal stated so, he wrote the same. He has also stated that when he wrote the Will, nobody was there and Rangammal tore off the draft. He has also stated there is no statement in Ex.B-109 that the contents of the Will were dictated by Rangammal and the Will was read over to her who admitted that the contents of Ex.B-109 were correct. He has also stated that there is no list of properties appended to the Will. He has stated that D.W.5 was assisting D.W.3 when the Will was written. He has also admitted in his evidence that Rangammal was moving about inside the house and she alone produced the earlier Will which is contrary to the recital in the Will which says that she was bedridden. Though he denied the suggestion that the Will was written on the basis of instructions given by the fourth defendant, the reading of his evidence shows that his evidence is not in conformity with the statements made in the written statement and there are contradictory statements in his evidence. D.W.3 has himself has stated that he was not aware which of her hands was shaky. Therefore we hold that the evidence of the scribe D.W.3 is full of contradiction with regard to the Will, Ex.B-109.

108. The identifying witness for registration, D.W.5 was an assistant to the scribe D.W.3 and his evidence is also contradictory to the evidence of D.W.3. He has stated that he was not aware who gave the particulars to write the draft of Ex.B-109. He has stated that D.W.3 brought the draft of Ex.B-109. He has also stated that he was the identifying witness. He has also stated that he did not remember what he told at the time of enquiry conducted by P.W.4 regarding the validity of the Will. He has stated that he might have been examined by the Registrar, P.W.4, but he did not know whether he informed in the said enquiry that he along with D.W.3 went to the residence of Rangammal on 27.11.1980. He has also stated that D.W.3 is his uncle. He has also stated that he did not know whether Rangammal was suffering from paralysis. He has stated that Rangammal had a good eye sight on 27.11.1980 and he did not know whether Rangammal was in a position to sign on 27.11.1980.

109. Now, it would be convenient to refer to the evidence of D.W.2. Mr.T.R.Mani, learned senior counsel referred to relevant passages of his

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evidence found at pages 163 to 167 and 169 to 172 of the typed-set of papers. His evidence shows that Rangammal was able to walk. His evidence is quite contrary to the statement made in the written statement as well as the contents of the Will that she was bedridden. His evidence is contrary to the averment made in the written statement that Rangammal dictated the Will. The evidence of D.W.2 also shows that Rangammal had a good eye sight which is quite contrary to the statement made in the Will that her eyesight was failing.

110. Mr.T.R.Mani, learned senior counsel referred to the conduct of D.W.2. He submitted that he was only a pawn broker licensee whereas he has stated that he was a jewellery merchant. He also referred to the proceedings initiated against D.W.2 in the criminal Courts. D.W.2 has stated that he is a relative of Rangammal and he gained confidence of Rangammal. D.W.2 has also stated that he did not know that Rangammal was suffering from paralysis, but he knew that Rangammal was suffering from rheumatic pain and he did not know whether Rangammal was taking treatment from 10th defendant for rheumatic pain. He has also stated that at the time of execution of the Will Ex.B-109, the defendants 4 and 5 were not residing in the house of Rangammal which is contrary to the statement of D.W.1 where he has stated that at the time of execution of the Will, the fifth defendant was present. He has also stated that no statement was obtained from him at the time of enquiry conducted regarding the validity of the Will.

111. The Sub-Registrar was examined as D.W.6. He has admitted that he registered the document Ex.B-109 as document No.25/1980, but he was not able to give the details of the document registered in document No.24/1980 or 26/1980, though he was able to remember the particulars with reference to Ex.B-109. He has also stated that he did not know whether at the time of registration the defendants 4 and 5 were present or not and whether Dr.Lakshmanan was present or not. He also stated that he did not know whether Rangammal was affected by paralytic attack. He has stated that Rangammal was speaking well. He was not able to remember whether any servant was present in the house of Rangammal, though he admitted that the house of Rangammal was a big house. He also stated that Rangammal wrongly put her thumb impression in one place and he scored out the same and got her thumb impression again. Mr.T.R.Mani,learned senior counsel submitted that the evidence of D.W.6 clearly shows that the Sub-Register went to the residence of Rangammal without any Assistants or Peons as Sub Registrar is not expected to get the thumb impression, and we are of the view that the criticism cannot be said to be unjust and the said criticism is a valid criticism. D.W.6 has also stated that Rangammal had a good eye sight which is contrary to the recital in the Will. He has further stated that it is not correct to say that Rangammal was bedridden. He has also stated that Rangammal had the capacity to sign. He admitted that he did not know who are Palanisami and palanivelu, whether they are black or red; tall or short.

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112. There is documentary evidence which are referred to by Mr.T.R.Mani, learned senior counsel, namely, Ex.A-18 dated 1.12.1980 and Ex.A-22 dated 4.12.1980. D.W.1 in his cross examination has admitted that the signatures found in Exs.A-18 and A-22 are the signatures of Rangammal. We find that Rangammal signed the abovesaid documents just few days after the date of the Will, namely, 27.11.1980. The defendants 4 and 5 have not explained why Rangammal could not sign the Will dated 27.11.1980 when she was able to sign just four days later.

113. On the appreciation of the entire evidence on record, we are of the view that the trial Court was correct in holding that the defendants 4 and 5 have not discharged the burden cast on them. There is another circumstance which is relevant for the purpose of this case. In Ex.A-5 Will, Palaniappa Chettiar and Rangammal devised that the properties should go to charities. It is a joint and mutual Will. In the Will all the relatives of both Palaniappa Chettiar and Rangammal were excluded from claiming any right over the properties or from claiming any right of inheritance in the properties and there was no fresh necessity for Rangammal to exclude all her relatives from her bequest. We have already held that their intention was that the properties should go to charities. It is also seen from the earlier Will in Ex.A-6 dated 15.7.1931, Palaniappa Chettiar had always the intention to bequeath his properties in favour of charities. In the Will of the year 1931, he has stated that if he has any issue, 1/4th of his properties should go to charities and if he has no issues, 3/4th of his properties should go to charities. Both Palaniappa Chettiar and Rangammal had led a long married life and both of them were in the advanced age at the time of execution of Ex.A-5 Will and they had no issues. Mr.T.R.Mani, learned senior counsel submitted that it is unbelievable that Rangammal would choose the defendants 4 and 5 as legatees who belong to a different caste altogether. We find that the submission of learned senior counsel cannot be said to be without any force as Rangammal was 88 years old at the time of her death and it is normally expected that Rangammal would have respected and acted according to her deceased husband's direction that at least his properties should go to charities, even assuming that she was a person of her own free will. Even assuming that it was only the pious wish of Palaniappa Chettiar that his properties should go to charities, there is no explanation as to why Rangammal went against the wishes of her deceased husband that the properties should go to charities and for choosing the defendants 4 and 5 to bequeath all the properties in their favour. The case that the defendants 4 and 5 were taking care of Rangammal and hence, she bequeathed her properties and all the properties obtained from her husband in their favour requires a very strong and high degree of proof for acceptance.

114. We are of the view that the dictum laid down by the Supreme Court in H.Venkatachala case (AIR 1959 SC 443) would apply to the facts of the case. It is a case where there are suspicious circumstances surrounding the Will. Though there is a statement in the Will that the hands of the testatrix were shaky and she could not sign the document and hence, she

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put her thumb impression, the evidence of witnesses who were examined on behalf of defendants 4 and 5 clearly establish that Rangammal was able to sign on the date of execution and her eye sight was normal and she was hale and healthy and in spite of the same, it is stated that she affixed her thumb impression, for which there is no explanation from the side of the defendants 4 and 5. There is also no explanation for her thumb impression at the time of registration when the case of the defendants 4 and 5 was that she could sign once or twice but, she could not sign 4 or 5 times. On the other hand, it is seen from Ex.A-16 that when they presented the Will (Ex.A-5) for registration, Palaniappa Chettiar and Rangammal refused to put thumb impression, but insisted to sign and that shows her attitude and there is documentary evidence to show that she was able to sign. We therefore hold that the statement in the Will that she was not able to sign and hence, affixed her thumb impression creates a genuine suspicion, particularly when the evidence let in on behalf of the defendants is to the effect that Rangammal was able to sign on the date of execution of the document which is contrary to the statement made in the Will and the suspicion has not been removed by the defendants 4 and 5. We also find that when the Will says that she was bedridden, the evidence is that she was hale and healthy and she was able to move about. The disposition made in favour of third parties is quite unnatural as she would not have acted against her deceased husband's direction but, on the other hand, normally she would have respected his directions in the earlier Will, Ex.A-5 that the properties should go to charities as she led a long married life with her husband. It is for the defendants 4 and 5 to remove the suspicious circumstances created in getting the thumb impression in the Will, Ex.B-109, particularly when the evidence let in on the side of the defendants show that Rangammal was not affected by paralysis and she had a normal eye sight and her hands were not shaky and she had no nervous disability. We are of the view, the defendants 4 and 5 have not discharged the burden cast on them to dispel the suspicious circumstances surrounding the Will and satisfy the Court that it was her last will. Learned Subordinate Judge had the opportunity to see the demeanour of the witnesses and he has held that the suspicious circumstances surrounding the execution of the will were not cleared and his judicial conscience was not satisfied to accept the will (Ex.B-109) as a valid, true, genuine and last will of Rangammal. We therefore hold that the defendants have not removed the suspicious circumstances surrounding the execution of the Will to the satisfaction of the Court for accepting the Will as genuine and last Will of Rangammal. We also hold that the defendants 4 and 5 failed to establish that Ex. B-109 is the true, genuine and last Will of Rangammal. We fully concur with the reasonings and the conclusion of the trial Court. Apart from the reasonings of the trial Court, we also hold that the defendants 4 and 5 have not discharged the burden cast on them to remove the legitimate suspicion surrounding the execution of the Will. We hold that the discrepancies in the evidence cannot be said to be immaterial as the statements made in the Will are contrary to the depositions of the witnesses examined on their behalf and in may respects, their statements

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made in the evidence are contrary to the written statement of the defendants 4 and 5. On appreciation of the entire evidence on record, we come to the conclusion that the Will dated 27.11.1980, Ex.B-109 alleged to have been executed by Rangammal is not a true and genuine Will of hers and it is not her last Will also.

115. In so far as the enquiry conducted by the Registrar P.W.4 is concerned, it is only an administrative enquiry and the report of the enquiry was not produced. Hence, we are of the view that it is not necessary to consider the validity of the said enquiry and it has no bearing as the entire evidence has been let in before the Court and the Court has to consider the question on the basis of evidence. In this view of the matter, we dismiss the appeal, A.S.No.606 of 1989 filed by the defendants 4 and 5.

116. In the result,

(i) A.S.No.851 of 1989 stands allowed. The judgment of the trial Court in so far as it is against the plaintiffs and the decree is set aside.

(ii) A.S.No.606 of 1989 stands dismissed. The finding of the trial Court on the issue No.13 framed by it stands confirmed.

(iii) The result is, learned Subordinate Judge, Gobichettipalayam or the Judicial Officer having jurisdiction over the matter is permitted to discharge the Receiver after the Receiver submits his accounts and on being satisfied that the Receiver can be discharged.

(iv) Learned Judicial Officer having jurisdiction over the case is directed to frame a proper Scheme for the trust and while framing the scheme, he need not include the District Munsif, Gobichettipalayam as one of the trustees, though the makers of the Will (Ex.A-5) have expressed their desire that the District Munsif, Gobichettipalayam should be one of trustees. We are of the view, it will not be proper to induct the District Munsif as one of the trustees as it may happen that litigation in respect of the trust as well as its properties may come up before him in his official capacity and it may not be advisable to induct him as one of the trustees. Learned Judicial Officer is also directed to take into account the wishes of the testators of Ex.A-5 while framing the Scheme, as they wished that the relatives of either of them should be excluded from the enjoyment and management of their properties. While appointing the trustees, learned Judicial Officer is directed to keep in mind that the persons of unimpeachable character and high integrity and at least, some of them, if possible from the community to which Palaniappa Chettiar belongs should be appointed as trustees. It will be open to the learned Judge to consider the entrustment of the administration and management of the trust to the Administrative General and Official Trustee (AG & OT) of this Court as he will be functioning under the guidance of this Court.

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(v) Since the plaintiffs have not prayed for costs, there will be no order as to costs in both the appeals.
(vi) C.M.P.No.5356 of 2004 stands dismissed.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

na.

To
The Subordinate Judge,
Gobichettipalayam.[with records)

+ 2 CCs to Govt. Pleader SR Nos.16777 and 16778

+ 1 CC to Mr.M. Kandasamy, Advocate SR NO 16746

+ 2 CCs to Mr.S.T.S.Murthi, Advocate SR NOs.16736 and 16737

+ 1 CC to Mr.B.T. Seshadri, Advocate SR NO 16790

+ 2 CCs to Mr.M.Duraisamy, Advocate SR NOs.16677 and 16678

+ 1 CC to Mr.M.M.Sundresh, Advocate SR NOs.16819 and 16820

+ 2 CCs to Mr.M.Sriram, Advocate SR NO 16886

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Pre-delivery Judgment in
A.S.Nos.606 & 851 of 1989
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